

UNIVERSITY OF TARTU
SCHOOL OF LAW
Department of Public Law

Getter Paberits

**TREATY INTERPRETATION IN THE WTO DISPUTE SETTLEMENT:
THE PROBLEM OF FRAGMENTATION**

Master's thesis

Supervisor
Dr iur Lauri Mälksoo

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Table of Contents

Introduction	4
1. Fragmentation of international law and international trade law in general	9
1.1. Fragmentation of international law as a phenomenon.....	9
1.1.1. Meaning	9
1.1.2. Background and reasons	12
1.2. International trade law as a special regime of international law	17
1.2.1. International trade law in general	17
1.2.2. The WTO law and the dispute settlement mechanism of the WTO as parts of international trade law	20
2. The fragmented practice of treaty interpretation in the WTO dispute settlement	24
2.1. The fragmented practice of the Art. 31(1) of the VCLT	24
2.1.1. The meaning of the Art. 31(1) of the VCLT	24
2.1.2. The Art. 31(1) of the VCLT in the WTO dispute settlement	30
2.1.3. Conclusions on the practice of the Art. 31(1) of the VCLT in the WTO dispute settlement.....	35
2.2. The fragmented practice of the Art. 31(3)(c) of the VCLT	37
2.2.1. The meaning of the Art. 31(3)(c) of the VCLT	37
2.2.2. The Art. 31(3)(c) of the VCLT in the practice of the WTO dispute settlement	41
2.2.3. Conclusions on the practice of the Art. 31(3)(c) of the VCLT in the WTO dispute settlement.....	47
3. The effect of the fragmented practice of treaty interpretation in the WTO dispute settlement to international law and community in general	53
3.1. Decreasing the credibility and reliability of the WTO	53
3.2. Decreasing the authority of the WTO.....	57
3.3. Triggering forum shopping.....	61
3.4. Strengthening international law	64
Conclusion.....	69
Rahvusvaheliste lepingute tõlgendamise vaidluste lahendamisel Maailma Kaubandusorganisatsiooni: killustatuse probleem.....	74
List of abbreviations	81
List of bibliography	83
List of normative sources	94
List of case law	95

Arbitral Awards	95
CJEU.....	95
ECtHR	95
ICJ.....	96
ICTR.....	96
ICTY	97
Iran - US Claims Tribunal	97
ITLOS	97
WTO	97
List of other sources	100

Introduction

“A rule of international law, whether customary or conventional, does not operate in a vacuum. It operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part.”¹ This idea was expressed by the ICJ already in 1980 and should still be one of the cornerstones of international law. It has been argued that the conflict between functional regimes of international law is one of the most pressing problems of the fragmentation of international law.² Thus, during recent decades there have been many discussions and debates questioning whether international law is fragmented and, if yes, to what extent it is fragmented. At the same time, there are still many controversial opinions and unanswered questions.

One of these is the position of the WTO in the fragmentation process - how does it affect the fragmentation of international law? The WTO concerns only a very specific area and very specific cases. Even though the Appellate Body of the WTO has stated in its first report that the WTO law “should not be read in clinical isolation from public international law”³, there still persists the question whether this statement is actually followed during the WTO dispute settlement process. Thus, the current thesis is concentrating on the role of the WTO dispute settlement in the fragmentation of international law.

There are different ways of how to address the problem of fragmentation of international law. The present thesis is concentrating only on the topic of treaty interpretation, as this is one of the central tasks of every international court and tribunal. It concentrates on the treaty interpretation rules of the VCLT - the so-called “treaty on treaties” - as this covers the most important areas of treaty interpretation and is the indispensable starting point for any description of the law.⁴ More precisely, the treaty interpretation methods laid down in the Art. 31(1) of the VCLT and the application of the Art. 31(3)(c) of the VCLT in the WTO dispute settlement will be analysed.

¹ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, I.C.J. Reports 1980, p. 73, para. 10.

² Michaels, R., Pauwelyn, J. Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law. - *Duke Journal of Comparative & International Law*. 2012/22, p. 367.

³ Appellate Body Report. *United States - Standards for Reformulated and Conventional Gasoline*. 1996. WT/DS2/AB/R, p. 16; Delimatsis, P. The Fragmentation of International Trade Law. 2010. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1554909 (15.04.2017), p. 11.

⁴ Aust, A. Vienna Convention on the Law of Treaties (1969). 2006. - *Max Planck Encyclopedia of Public International Law*. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498?rskey=t4avbk&result=1&prd=EPIL> (15.04.2017), para. 1.

In the view of fragmentation of international law the interpretation of a treaty plays an extremely important role.⁵ On the one hand, treaty interpretation can be seen as a diplomacy which avoids or mitigates normative conflict.⁶ Treaty interpretation results in releasing the exact meaning and the content of the rule of law that is applicable to a given situation.⁷ Therefore, treaty interpretation can be part of the solution to fragmentation.⁸ Treaty interpretation may offer shared hermeneutics in search of a more systemic integration of diverse treaties and tribunals and inject a degree of coherence into the fragmented landscape of international law.⁹ On the other hand, treaty interpretation may also be part of the fragmentation of international law. Different tribunals may interpret the same rules differently, each having their own guiding objective, underlying value system, and interpretative community, thereby contributing to the fragmentation of international law.¹⁰

It is not clear that even if the practice of the WTO dispute settlement increases the fragmentation of international law related to treaty interpretation, what is the real effect of it to the international community and international law in general. There are many scholars who have criticised the WTO Appellate Body and panels for its reports which conflict with the interpretation rules of the VCLT.¹¹ But very often these articles do not get further from

⁵ Elsig, M. Pauwelyn, J. The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals. 2011. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938618 (15.04.2017), p. 3.

⁶ Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. 2006. A/CN.4/L.682. Available at: http://www.repositoriocdpd.net:8080/bitstream/handle/123456789/676/Inf_KoskenniemiM_FragmentationInternationalLaw_2006.pdf?sequence=1 (15.04.2017), para. 37.

⁷ Sorel, J.-M., Boré Eveno, V. Art. 31, para. 3. - Corten and Klein, P. (eds). The Vienna Convention on the Law of Treaties. A Commentary. Vol. 1. Oxford: Oxford University Press 2011; Daillier, P. *et al.* A. Droit international public. 7e ed. Paris: LGDJ 2002, p. 253.

⁸ Elsig and Pauwelyn, p. 3.

⁹ Bianchi, A. Textual Interpretation and (International) Law Reading: the Myth of (In)determinacy and the Genealogy of Meaning. - Bekker, P. Dolzer, R. Waibel, M. (eds). Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts. Cambridge: Cambridge University Press 2010, pp 34-55.

¹⁰ Crema, L. Disappearance and New Sightings of Restrictive Interpretation(s). - European Journal of International Law. 2010/21. No. 3, pp 681-700; Sorel, J.-M., Boré Eveno, V. Art. 31, para. 3. - Corten and Klein; Daillier *et al.*, p. 170.

¹¹ See for example: Gruszczynski, p. 36; Ortino, F. Treaty Interpretation and the WTO Appellate Body Report in US - Gambling: A critique. - Journal of International Economic Law. 2006/9. Issue 1; Chung, C.-M. Interpreting "Interconnection": Hermeneutics of the WTO Mexico-Telecommunications Case. 2006. Available at: <http://www.jeanmonnetprogram.org/wp-content/uploads/2014/12/060301.pdf> (15.04.2017); McRae, D. Treaty Interpretation and the Development of International Trade Law by the WTO Appellate Body. - Sacredoti, G., Yanovich, A., Bohanes, J. (eds). The WTO at Ten. The Contribution of the Dispute Settlement System. Cambridge: Cambridge University Press 2006; Delimatsis, p. 14; Pauwelyn, J. Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law. Cambridge: Cambridge University Press 2003; Broude, T. International Governance in the WTO: Judicial Boundaries and Political Capitulation. London: Cameron May 2004, pp 267-268; Mitchell, A. D. Legal Principles in WTO Disputes. Cambridge: Cambridge University Press 2008, p. 66.

criticising certain reports. We can read between the lines negative opinion about this phenomenon, but the further effects are hardly ever analysed. Thus, there is a need to analyse the real practice of the fragmentation of treaty interpretation in the WTO dispute settlement. Do these reports bring real effects in practice? Are the states also concerned about the way how the treaties are being interpreted in the WTO dispute settlement? Or is it rather a fiction and a problem existing only in academic papers? Thus, the aim of the master's thesis is to find out how the fragmentation of treaty interpretation in the WTO dispute settlement affects international law and international community in general.

To conclude on the research problems - there are two research questions that will be solved. Firstly, is the practice of treaty interpretation in the WTO dispute settlement fragmented? Secondly, to the extent that the answer to the first question is affirmative, which are the possible effects of the fragmented practice of treaty interpretation in the WTO dispute settlement to the international community and international law in general? Respectively, there are two hypotheses of the master's thesis. Firstly, the practice of treaty interpretation is fragmented in the WTO dispute settlement. Secondly, the fragmentation of treaty interpretation in the WTO dispute settlement affects the international community and international law in general, but these effects are not fundamental.

During writing the master's thesis, various combined research methods have been used to find satisfying and adequate answers to the research questions. Mostly the analytical and systematic methods are used. The research problem and questions are approached in a systematic way. First it is explained whether the practice of treaty interpretation is fragmented in the WTO dispute settlement and afterwards, to the extent that the answer to the first question is affirmative, the effect of it is analysed. Some examples of these cases which address the questions of treaty interpretation are analysed and compared to each other but also to cases from other international courts and tribunals. Thus, also the comparative method is used. The analytical and comparative methods are also used to analyse the possible results of the fragmented practice of treaty interpretation in the WTO dispute settlement and to compare the opinions on the current issue by different scholars.

The present thesis is divided into three chapters. The first chapter introduces the general terms used in the paper to give an overview and understanding to the reader. First of all, it explains the fragmentation of international law as a phenomenon. It explains the meaning of fragmentation of international law, but also analyses the background and possible reasons of

it. Furthermore, the first chapter also gives an overview of international trade law as part of international law and explains how the WTO law is linked to international trade law. This is the necessary knowledge to continue with the research problems and it answers also the question, whether the VCLT is and should be applicable in the WTO dispute settlement.

The second chapter is dealing directly with the first research question - whether the practice of treaty interpretation is fragmented on the example of the WTO dispute settlement. It concentrates on one topic - interpretation of a treaty - which has different angles. Firstly, it analyses whether the WTO Appellate Body and panels use in their practice interpretation methods laid down in the Art. 31(1) of the VCLT and whether they use a holistic approach while interpreting a treaty. Secondly, it concentrates on the Art. 31(3)(c) of the VCLT and analyses whether the WTO Appellate Body and panels take into account general rules of international law and rules of other specific regimes of international law while interpreting a treaty.

The third chapter analyses the impact of the fragmented practice of treaty interpretation in the WTO dispute settlement to the international community and law in general. It presents the ideas from scholars, but also my own ideas, and gives my overall opinion on the topic. The aim of this chapter is not to say conclusively whether the fragmentation of treaty interpretation in the WTO dispute settlement is negative or positive. It rather analyses all the possible outcomes of it and also the possibility of their occurrence in reality.

While writing the thesis I have used a wide range of sources, for example legal articles, research papers and books from different legal scholars, like M. Koskenniemi, J. Pauwelyn and D. McRae who have often addressed the problem of fragmentation of international law in their works. The most important normative source used is the VCLT, but some other treaties, like the GATT, the WTO Agreement and the NAFTA, are referred to. The thesis also analyses the case law from the WTO dispute settlement and from other international courts and tribunals. Only these cases are analysed which address the question of treaty interpretation.¹² I worked through all the relevant case law of the WTO dispute settlement since the establishment of the WTO in 1995 and, taking into consideration the limited length of the master's thesis, made a choice which cases to reflect in the current thesis. I decided to

¹² The case law from the years 1995-2013 has been brought out by topics in the following book: Appellate Body Secretariat (editor). WTO Appellate Body Repertory of Reports and Awards 1995-2013. 2 Volume Set. 5th ed. Geneva: WTO Publications 2015. The list of the cases in the WTO dispute settlement is available on the Website of the WTO: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm (15.04.2017).

concentrate mostly on cases which have been criticised by many scholars, because this gave me also an opportunity to analyse the criticism and give my opinion whether it is justified or not.

The keywords provided by the Estonian Subject Thesaurus that the best characterise the current master's thesis are the following: international law, international trade, interpretation, treaty and fragmentation.

1. Fragmentation of international law and international trade law in general

The current chapter gives an overview of the fundamental topics of the current master's thesis - fragmentation of international law (section 1.1.) and international trade law and, especially, the position of the WTO in it (section 1.2.).

1.1. Fragmentation of international law as a phenomenon

Firstly, the meaning of the phenomenon of fragmentation will be explained (section 1.1.1.) and, secondly, the background and possible reasons of the fragmentation of international law will be discussed (section 1.1.2.).

1.1.1. Meaning

The dictionary definition of fragmentation is “the process or state of breaking or being broken into fragments”.¹³ In legal context the term “fragmentation” can be defined as the emergence of specialised and relatively autonomous spheres of social action and structure.¹⁴ To understand the real meaning of the fragmentation of international law it is necessary to understand also the meaning of a conflict, because the fragmentation of international law is basically conflicting laws or practices. Many definitions for the term “conflict” can be found. In the current thesis a conflict is seen as a situation where in substantive law two rules or principles suggest different ways of dealing with a problem¹⁵ or where in practice of international courts and tribunals different institutions have adopted conflicting practice relating to the same or similar question.

The opposite to the fragmentation of international law is the unity or coherence of it. The dictionary definition of unity is “the state of being united or joined as a whole”¹⁶ and of

¹³ Fragmentation. Oxford Dictionaries Online. Available at: <https://en.oxforddictionaries.com/definition/fragmentation> (15.04.2017).

¹⁴ Shaw, M. N. International Law. 6th ed. New York: Cambridge University Press 2008, p. 66.

¹⁵ Report of the Study Group of the International Law Commission, para. 25.

¹⁶ Unity. Oxford Dictionaries Online. Available at: <http://oxforddictionaries.com/definition/english/unity?q=unity> (15.04.2017).

coherence is “the quality of forming a unified whole”.¹⁷ The unity and coherence of international law attributes universality to the core content of international law.¹⁸

The phenomenon of fragmentation of international law derives from the diversity of international law both in substance and procedure.¹⁹ There are different approaches to the fragmentation of substantial law and to the fragmented practice of international law. In the current thesis it is explained based on the approaches by J. Pauwelyn and the ILC working group led by M. Koskenniemi. For better overview it is concluded in the Figure 1.

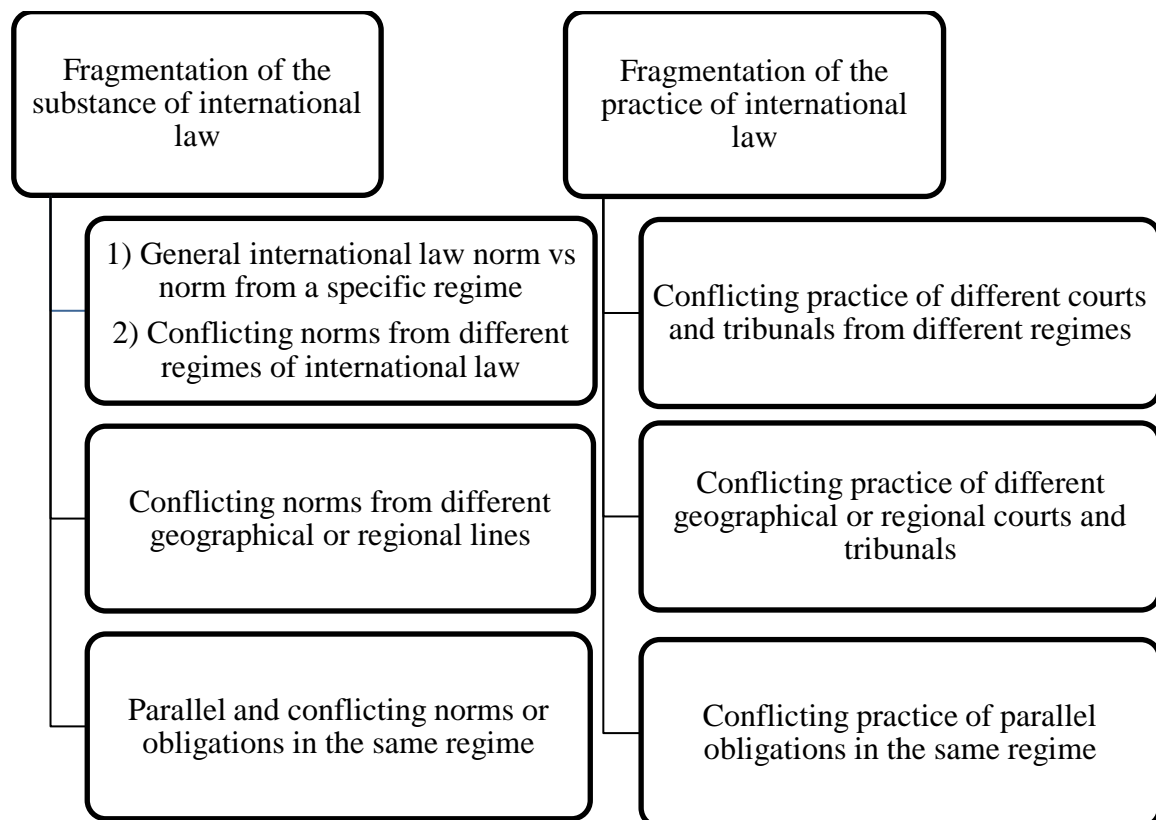


Figure 1. The types of fragmentation of international law

Firstly, there can be conflicts of substantial law between general international law and a special regime of international law.²⁰ The substance of international law can be fragmented along different regimes such as human rights law, international economic law, environmental

¹⁷ Coherence. Oxford Dictionaries Online. Available at: <https://en.oxforddictionaries.com/definition/coherence> (15.04.2017).

¹⁸ Rao, P. S. Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation? - Michigan Journal of International Law. 2004/25. Issue 4, p. 930.

¹⁹ Pauwelyn, J. Fragmentation of International Law. 2006. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1406?rskey=MyjMcN&result=1&prd=EPIL> (15.04.2017), para. 2.

²⁰ Report of the Study Group of the International Law Commission, para. 46.

law, humanitarian law, international criminal law and the law of the sea.²¹ These regimes often correspond to functionally specialized international organizations, like the WTO, UNEP, WIPO, ILO, WHO etc.²² Each regime comes with its own principles and its own form of expertise which is not necessarily identical to the principles and form of expertise of neighboring specialization.²³

Fragmentation of, or between, those regimes becomes an issue when such functionally specialized regimes claim autonomy either from each other or from general international law.²⁴ For instance, trade law and environmental law have highly specific objectives and rely on principles that may often point in different directions.²⁵ Also, very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law.²⁶ The current thesis is also concerning one of the specific regimes of international law - the international trade law which is defined and more explained in the section 1.2.

Secondly, substantial international law is fragmented also along geographical or regional lines.²⁷ Even if it concerns the same regime, for example international trade law or human rights law, international law differs depending on the state or region in question.²⁸

Thirdly, previous two types of substance fragmentation also give rise to another form of substance fragmentation, namely parallel or conflicting norms or obligations in the same issue-area applying to the same states or subjects of international law.²⁹ Whereas both issue-area fragmentation and regional fragmentation are horizontal in nature - between subject areas or between regions - parallel norms in the same issue-area applying to the same subject are vertical in nature, potentially raising conflicts between different levels of regulation of the same subject area.³⁰

²¹ Pauwelyn 2006, para. 2.

²² *Ibid.*

²³ Report of the Study Group of the International Law Commission, para. 15.

²⁴ Pauwelyn 2006, para. 2.

²⁵ Report of the Study Group of the International Law Commission, para. 15.

²⁶ *Ibid.*

²⁷ Forteau, M. Regional International Law. 2006. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1463?rskey=1Yr8o0&result=1&prd=EPIL> (15.04.2017), para. 6; Pauwelyn 2006, para. 3.

²⁸ Pauwelyn 2006, para. 3.

²⁹ Banaszewska, D. M. Lex Specialis. 2015. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2171?rskey=xSQVEM&result=1&prd=EPIL> (15.04.2017), para 1; Pauwelyn 2006, para. 4.

³⁰ Pauwelyn 2006, para. 4.

Besides the fragmentation of substantial international law, the diversity of international law extends also to procedure.³¹ Procedure fragmentation arises in the context of multiple international courts and tribunals.³² Following the three types of substance fragmentation described earlier, the practice of international courts and tribunals may be fragmented in the same way.³³ Firstly, the procedure fragmentation can exist on a functional or regime lines.³⁴ Secondly, the practice of international courts and tribunals can be fragmented on geographical or regional lines.³⁵ Thirdly, the practice of international courts and tribunals can be fragmented as a result of parallel obligations in the same regime for the same subjects.³⁶

The current thesis concentrates on the fragmented practice of international law, more precisely, on conflicting practice of the WTO dispute settlement and other international courts and tribunals. In the next section the background and possible reasons of the fragmentation of international law will be discussed.

1.1.2. Background and reasons

Fragmentation of international law is not at all a new phenomenon.³⁷ It is a result of the significant development of international law over time which concerns its basis, its substance, its structural principles and its addressees.³⁸ International law has mutated from a legal system reflecting the need to guide the co-existence of a few subjects of international law to an embracing legal regime in which the international community participates.³⁹

The background of fragmentation of international law was sketched already in the 1950-s by W. Jenks.⁴⁰ He wrote: “Law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law. /.../ One of the most serious sources of conflict between law-making treaties is the important

³¹ Pauwelyn 2006, para. 5.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ Pauwelyn 2006, para. 7.

³⁸ Wolfrum, R. International Law. 2006. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1424?prd=EPIL> (15.04.2017), para. 91.

³⁹ *Ibid.*

⁴⁰ Report of the Study Group of the International Law Commission, para. 5.

development of the law governing the revision of multilateral instruments and defending the legal effects of revision.”⁴¹

Firstly, already in the 1950s one of the main reasons of the fragmentation of international law - the fast development of international law⁴² - was pointed out. It is characteristic to any law that it may change over time.⁴³ International law has not just expanded horizontally to embrace the new states which have been established since the end of the Second World War.⁴⁴ It has extended itself to include individuals, groups and international organisations, both private and public, within its scope.⁴⁵ But most importantly - it has also moved into new regimes covering such issues as international trade, problems of environmental protection, human rights, outer space explorations etc.⁴⁶

One of the major problems of international law is to determine when and how to incorporate new standards of behaviour and new realities of life into the already existing framework, so that, on the one hand, the law remains relevant and, on the other hand, the system itself is not too vigorously disrupted.⁴⁷ Therefore, the rise of specialized regimes that have no clear relationship to each other has brought up the question about fragmentation of international law. Each of these different regime of international law regulates a specific set of ideas, values and corresponding institutional practice of professional experts knowledgeable in the language and vocabulary of the specialisation.⁴⁸ There is a concern that irresolvable systemic conflicts may arise if the broader and general international legal system does not support or provide normative context for the interaction between these differentiated international legal systems.⁴⁹

⁴¹ Jenks, C. W. The Conflict of Law-Making Treaties. - British Yearbook of International Law. 1953/30, p. 430.

⁴² See also: Andenas, M. Reassertion and Transformation: From Fragmentation to Convergence in International Law. - Georgetown Journal of International Law. 2015/46; Hafner, G. Pros and Cons Ensuing from Fragmentation of International Law - Michigan Journal of International Law. 2004/25, p. 854; Pauwelyn 2003, p. 14.

⁴³ Pauwelyn 2003, p. 14.

⁴⁴ Shaw, p. 45.

⁴⁵ *Ibid*, p. 45.

⁴⁶ *Ibid*, p. 45.

⁴⁷ *Ibid*, p. 43.

⁴⁸ Treves, T. Fragmentation of International Law: The Judicial Perspective. - Agenda Internacional. 2009. Año XVI. N° 27, p. 216; Yearwood, R. R. F. The Interaction Between World Trade Organisation (WTO) Law and External International Law: The Constrained Openness of WTO law (a prologue to a theory). New York: Routledge 2012, p. 29.

⁴⁹ Yearwood, p. 29.

Secondly, the quote of W. Jenks reflects another reason of fragmentation of international law - the lack of centralised organs.⁵⁰ The rise of international and regional organisations is also a feature of modern international law.⁵¹ International organisations have been accepted as possessing rights and duties on their own and a distinctive legal personality.⁵²

The phenomenon of fragmentation of international law gained prominence after the end of the Second World War and, even more so, since the end of the Cold War.⁵³ After the Second World War the international order was built on functional divisions, for instance the so-called Bretton Woods institutions (IBRD, World Bank, IMF and GATT) focused on the world's economic problems and the UN institutions dealing with the world's security and political problems.⁵⁴ Specialized UN agencies, in turn, were tasked with specialized, expert-run subject matters such as food and agriculture (FAO and WFP), communications (ITU), labor (ILO), intellectual property (WIPO) and the environment (UNEP).⁵⁵ Originally, these different international organisations operated largely in isolation.⁵⁶ The increasing role of international organisations on the international scene is one of the factors contributing to the move of the international legal system away from its traditional status as the exclusive realm of states.⁵⁷

Thirdly, there is also no centralised adjudicator in international law or no hierarchical international court system.⁵⁸ Even though the ICJ has a widespread nickname "World Court"⁵⁹ and is, for instance, in media sometimes referred to as "the world's highest court"⁶⁰,

⁵⁰ See also: Abi-Saab, G. Fragmentation or Unification: Some Concluding remarks. - NYU Journal of International Law and Politics. 1999/31, p. 926; Hafner, p. 854; Hestermeyer, H. Human Rights and the WTO: The Case of Patents and Access to Medicines. Oxford: Oxford University Press 2007, p. 170; Gruszczynski, p. 4; Pauwelyn 2003, p. 13; Pauwelyn 2006, para. 7; Report of the Study Group of the International Law Commission 2006, para. 5.

⁵¹ Shaw, p. 47.

⁵² *Ibid.*

⁵³ Hafner, p. 849; Pauwelyn, J. Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands. - Michigan Journal of International Law. 2004/25; Pauwelyn 2006, para. 8.

⁵⁴ Pauwelyn 2006, para. 8.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Wellens, K. Fragmentation of International Law and Establishing Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap. - Michigan Journal of International Law. 2004/25. Issue 4, p. 1160.

⁵⁸ Pauwelyn 2003, p. 16.

⁵⁹ See for example: Llamzon, A. P. Jurisdiction and Compliance in Recent Decisions of the International Court of Justice. - The European Journal of International Law. 2008/18. No. 5, p. 815; Bekker, P. H. F., Levine, J., Weinacht, F. The World Court Dismisses Serbia and Montenegro's Complaints Against Eight NATO Members. - American Society of International Law. 2004/8. Issue 30; Shaw, p. 1057; Kwiatkowska, B. Decisions of the World Court Relevant to the UN Convention on the Law of the Sea. A Reference Guide. The Hague: Kluwer Law International 2002.

⁶⁰ See for example: Escritt, T. World's Highest Court Will Hear a Case from a Tiny Island Country in the Pacific That's Taking on 3 Nuclear Nations. - Business Insider. 4 March 2016. Available at: <http://www.businessinsider.com/the-worlds-highest-court-will-hear-a-case-from-a-tiny-island-country-in-the-pacific-thats-taking-on-3-nuclear-nations-2016-3?r=US&IR=T&IR=T> (15.04.2017); Jaura, R. World's Highest

it does not enjoy a higher position than every other court. The Art. 92 of the UN Charter designates the ICJ as the principal judicial organ of the UN, but there is no formal hierarchy of international courts and tribunals.⁶¹

Fourthly, the increase in the case-load of existing tribunals and the establishment of new tribunals and courts is also one of the reasons of the fragmentation of international law.⁶² Since the end of the Cold War a multitude of new international courts and tribunals have been created including the ITLOS, the WTO Dispute Settlement Body, the ICTY, the ICTR, the ICC, the NAFTA tribunals, the investment tribunals under BITs and the ACtHPR.⁶³ This situation is also referred to as proliferation of international courts and tribunals.⁶⁴

On the one hand, the increasing practice of courts and supervisory bodies strengthens the adjudicatory process in international law, and may be seen as strengthening the international rule of law.⁶⁵ International law is more likely now than ever before to be followed up through formalised procedures designed to ensure that the law is applied in specific cases.⁶⁶ On the other hand, this development poses also challenges to the unity of international law. Most of these courts operate within their own special regime (functional, regional or national) and will primarily interpret and apply international law within the framework of that particular regime.⁶⁷

Court Addresses Nuclear Disarmament. - InDepthNews. 13 March 2016. Available at: <http://www.indepthnews.net/index.php/global-governance/united-nations/249-world-s-highest-court-addresses-nuclear-disarmament> (15.04.2017).

⁶¹ Linton, S., Tiba, F. K. The International Judge in an Age of Multiple International Courts and Tribunals. - Chicago Journal of International Law. 2009/9. No. 9, p. 415; Oellers-Frahm, K. Multiciplation of International Courts and Tribunals and Conflicting Jurisdiction - Problems and Possible Solutions. - Frowein, J. A., Wolfrum, R. (eds). Max Planck Yearbook of United Nations Law. Vol 5. 2001. The Hague: Kluwer Law International 2001, p. 75; Shabtai, R. International Court of Justice (ICJ). 2006. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e34?rskey=D1s2Et&result=1&prd=EPIL> (15.04.2017), para. 20.

⁶² Dupuy, P.-M. The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice. - NYU Journal of International Law and Politics. 1999/31, p. 792; Fauchald, O. K., Nollkaemper, A. Introduction. - Fauchald, O. K., Nollkaemper, A. (eds). The Practice of International and National Courts and the (De-)Fragmentation of International Law. Portland: Hart Publishing 2014, p. 4; Kingsbury, B. Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem? - NYU Journal of International Law and Politics. 1999/31, p. 679; Reinisch 2011, para. 15.

⁶³ Pauwelyn 2006, para. 8.

⁶⁴ Charney, J. I. The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea. - American Journal of International Law. 1996/90, p. 69; Reinisch, A. International Courts and Tribunals, Multiple Jurisdiction. 2011. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e41?rskey=g4r0RT&result=1&prd=EPIL> (15.04.2017), para. 2; Shaw, p. 1115.

⁶⁵ Fauchald and Nollkaemper. Introduction. 2014, p. 3.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

Fifthly, another reason for fragmentation of international law is the multitude of law-makers at the domestic level.⁶⁸ Although the states are considered under international law to constitute one single entity, in practice they are represented by a multitude of domestic actors in the international law-making process.⁶⁹ Even if for most treaties parliament's approval may be required, the fact remains that treaties are not normally negotiated by the members of parliament but by diplomats or civil servants.⁷⁰ And the delegates representing a state in the WTO context are not the same as those representing the same state in the UNEP, WHO or WIPO.⁷¹ In addition, it is often the case that also different private interest groups are at play in different treaty settings.⁷² When it comes to the creation of customary international law, the variety of actors is arguably even wider.⁷³ Therefore, the multitude of actors having a role in the construction of one and the same state's consent is another factor that increases the risk of inconsistencies arising between different norms or expressions of the same state's consent.⁷⁴

Sixthly, one of the reasons of fragmentation of international law is also the transposition of functional differentiations of governance from the national to the international level.⁷⁵ It means that international law today increasingly reflects the differentiation of branches of the law which are familiar to us from the domestic sphere.⁷⁶

Last but not least, it should be noted that the increased reliance on soft law, for example, on declarations of international conferences or resolutions of the UN General Assembly which are essentially of a recommendatory value could cause confusion about the normative value of prescriptions in general.⁷⁷ Soft law, which by definition is not related to formal sources as prescribed under Art. 38(1) of the Statute of the ICJ could be interpreted and applied differently by different states, but also by different international courts and tribunals.⁷⁸ The result of such diversification of sources and the dilution of the form and content of international law could be its fragmentation.⁷⁹

⁶⁸ Pauwelyn 2003, p. 15.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Koskeniemi, M. The Fate of Public International Law: Between Technique and Politics. - The Modern Law Review. 2007/70. No. 1, p. 4; Simma, B. Universality of International Law from the Perspective of a Practitioner. - The European Journal of International Law. 2009/20. No. 2, p. 270.

⁷⁶ Simma, p. 270.

⁷⁷ Rao, p. 931.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

In conclusion, the fragmentation of international law as a phenomenon was noticed already decades ago and there are different reasons for it: the fast development of international law, the lack of centralised organs, the lack of centralised adjudicator, the proliferation of international courts, the increase of case-load of international courts, the multitude of law-makers at the domestic level, the transposition of functional differentiations of governance from the national to the international level and the reliance on soft law.

1.2. International trade law as a special regime of international law

The current section gives an overview of international trade law as a special regime of international law. Firstly, the meaning of international trade law in general will be explained (section 1.2.1.) and, secondly, the WTO law and the WTO dispute settlement system as a central element of international trade law will be examined (section 1.2.2.).

1.2.1. International trade law in general

In the past, international trade law, and in particular the GATT law which is the predecessor of the WTO law, was often considered to be an independent body of legal rules at the margins of international law.⁸⁰ Even though sometimes there is still disagreement among the scholars whether the international trade law is part of international law or not,⁸¹ it is mostly uncontested that the WTO is an integral part of international law, and its role is increasing in importance.⁸²

International trade law is considered as part of international economic law which is a very broad field of international law.⁸³ International economic law governs the international economic order which can be understood as the ensemble of policies, rules and institutions of the world economy.⁸⁴ International trade is the exchange of goods or services between

⁸⁰ van den Bossche, P., Prévost, D. *Essentials of WTO Law*. Cambridge: Cambridge University Press 2016, p. 8.

⁸¹ Pauwelyn 2003, p. 29. See also: McRae, D. *The Contribution of International Trade Law to the Development of International Law*. - *Collected Courses of the Hague Academy of International Law*. Vol. 260. Leiden: Martinus Nijhoff Publishers 1996; McRae, D. *The WTO in International Law: Tradition Continued or New Frontier?* - *Journal of International Economic Law*. 2000/3. Issue 1.

⁸² van den Bossche and Prévost, p. 8.

⁸³ van den Bossche, P. *The Law and Policy of the World Trade Organization: Text, Cases and Materials*. 2nd ed. Cambridge: Cambridge University Press 2008, p. 36.

⁸⁴ Herdegen, M. *Principles of International Economic Law*. Oxford: Oxford University Press 2013, p. 3; Stoll, P.-T. *World Trade Organization (WTO)*. 2014. - *Max Planck Encyclopedia of Public International Law*. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1555?rskey=DTvSPI&result=1&prd=EPIL> (15.04.2017), para. 90.

nations.⁸⁵ International trade law includes numerous levels of trade organisations and interactions.⁸⁶ It consists of, on the one hand, numerous bilateral or regional trade agreements and, on the other hand, multilateral trade agreements.⁸⁷

There are different reasons why there is a need for specific international trade rules. Firstly, countries must be restrained from adopting trade-restrictive measures both in their own interest and in the interest of the world economy.⁸⁸ Countries realise that, if they take trade-restrictive measures, other countries will do so too.⁸⁹

Secondly, international trade rules are necessary, because the traders and investors need a degree of security and predictability.⁹⁰ Traders and investors operating, or intending to operate, in a country that is bound by international legal rules will be able to predict better how that country will act in the future on matters affecting their operations in that country.⁹¹ The predictability and security resulting from international trade rules will encourage investments and trade and will thus contribute to global economic welfare.⁹²

Thirdly, national governments alone cannot cope with the challenges presented by economic globalisation.⁹³ The protection of important societal values such as public health, a clean environment, consumer safety, cultural identity and minimum labour standards is, as a result of increased levels of trade in goods and services, no longer a purely national matter.⁹⁴

Fourthly, international trade rules help to achieve a greater measure of equity in international economic relations.⁹⁵ Without international trade rules that are binding and enforceable on rich as well as poor countries, many countries would not be able to integrate fully in the world trading system and derive an equitable share of the gains of international trade.⁹⁶

⁸⁵ Black, H. C. Black's Law Dictionary. 8th ed. New York: West Publishing 1968, p. 1529.

⁸⁶ Johnsrud, K. International Trade Law Guide. 2016. Available at: http://library.law.columbia.edu/guides/International_Trade_Law (15.04.2017).

⁸⁷ Johnsrud; van den Bossche, p. 36; van den Bossche and Prévost, p. 2.

⁸⁸ van den Bossche, p. 33; van den Bossche and Prévost, p. 2.

⁸⁹ van den Bossche, p. 33.

⁹⁰ van den Bossche, p. 33; van den Bossche and Prévost, p. 2.

⁹¹ van den Bossche, p. 33.

⁹² *Ibid.*

⁹³ van den Bossche, p. 33-34; van den Bossche and Prévost, p. 2.

⁹⁴ 10 Things the WTO Can Do. The Website of the WTO. Available at: https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi00_e.htm (15.04.2017), p. 42; van den Bossche, p. 34. See also: The preamble to the Marrakesh Agreement Establishing the World Trade Organization.

⁹⁵ Vijayasri, G. V. The Importance of International Trade in the World. - International Journal of Marketing, Financial Services & Management Research. 2013/2. No. 9, pp 112-113; van den Bossche, p. 34; van den Bossche and Prévost, p. 2.

⁹⁶ van den Bossche, p. 34.

It has been found that before the WTO, the GATT used to be both the so-called “constitution of international trade law” and the dominant multilateral international trade institution.⁹⁷ The Art. XXIX of the GATT makes clear that the GATT was intended only as a provisional legal instrument.⁹⁸ The principal and enduring agreement was to be the Havana Charter which established the ITO, and the ITO was to be the key multilateral trade body.⁹⁹

In reality, until the WTO was established on 1st of January 1995, the GATT filled the void created by the rejection of the ITO.¹⁰⁰ The ITO charter never entered into force, because it was opposed by the Congress of the USA which feared that the ITO would encroach excessively on domestic sovereignty.¹⁰¹ Until the 1st of January 1995 the GATT remained the most important legal document in all of international trade law.¹⁰² And even though the GATT was not intended to be an international organisation, it gradually evolved into an international organisation based in Geneva.¹⁰³

However, despite the relative effectiveness of the dispute settlement regime of the GATT, a number of countries (especially the USA) became dissatisfied with the functioning of the dispute settlement system.¹⁰⁴ The problems with the GATT were the lack of a charter granting it legal personality, establishing its procedures and organisational structure.¹⁰⁵ Also, the disadvantages were the fact that the GATT had only provisional application, the fact that the Protocol of Provisional Application contained provisions enabling the GATT contracting parties to maintain legislation that was in force on accession to the GATT and was inconsistent with the GATT.¹⁰⁶ Furthermore, there existed ambiguity and confusion about the GATT’s authority, decision making ability, and legal status.¹⁰⁷

⁹⁷ Bhala, R. *International Trade Law: Theory and Practice*. 2nd ed. New York: Lexis Publishing 2001, p. 127.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Bhala, p. 128; Rao, p. 950.

¹⁰¹ Matsushita, M. *et al.* *The World Trade Organization: Law, Practice, and Policy*. Oxford: Oxford University Press 2003, p. 2; Trebilcock, M. J. *Advanced Introduction to International Trade Law*. Cheltenham: Edward Elgar Publishing 2015, p. 10.

¹⁰² Bhala, p. 128.

¹⁰³ Matsushita *et al.*, pp 2-3; Trebilcock, p. 10.

¹⁰⁴ Trebilcock, p. 25.

¹⁰⁵ Matsushita *et al.*, p. 3.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

Since 1995 the WTO has taken the central position in international trade law¹⁰⁸ and currently it is the only global international organisation dealing with the rules of trade between the nations.¹⁰⁹ The WTO law and its dispute settlement mechanisms are discussed more thoroughly in the following section.

1.2.2. The WTO law and the dispute settlement mechanism of the WTO as parts of international trade law

The idea of creating a world trade organisation emerged slowly from various needs and suggestions.¹¹⁰ The genesis of the WTO lay in the Uruguay Round of Multilateral Trade Negotiations, which took place under the framework of the GATT and were launched in 1986 as a consequence of the GATT Trade Ministers' Meeting in Uruguay.¹¹¹ Its distinctive feature has been that not only did it ensure further liberalisation of international trade, but it also resulted in the metamorphosis of the GATT into the WTO.¹¹² When the Draft Final Act of the Uruguay Round was issued in 1991, it contained a proposal for a new multilateral trade organisation.¹¹³

In 1994 the Marrakesh Agreement Establishing the World Trade Organisation was agreed on.¹¹⁴ The law of this agreement is the principal source of the WTO law.¹¹⁵ The WTO law is a complex set of rules dealing with trade in goods and services and the protection of intellectual property rights.¹¹⁶ The WTO law addresses a broad spectrum of issues, ranging from tariffs, import quotas and customs formalities to compulsory licensing, food safety regulations and national security measures.¹¹⁷

¹⁰⁸ Herdegen, M. *Principles of International Economic Law*. Oxford: Oxford University Press 2013, p. 178; Matsushita *et al*, p. 3; Sacerdoti, G. *WTO Law and the "Fragmentation" of International Law: Specificity, Integration, Conflicts*. - Janow, M. E., Donaldson, V., Yanovich, A. (eds). *The WTO: Governance, Dispute Settlement, and Developing Countries*. New York: Juris Publishing 2008, p. 595.

¹⁰⁹ What is the WTO? The Website of the WTO. Available at: https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (15.04.2017).

¹¹⁰ Matsushita *et al*, p. 6.

¹¹¹ Herdegen. *Principles of International Economic Law*. 2013, p. 173; Qureshi, A. H. *The World Trade Organization: Implementing International Trade Norms*. Manchester: Manchester University Press 1996, p. 3.

¹¹² Trebilcock, p. 11; Qureshi, p. 3.

¹¹³ Matsushita *et al*, p. 7.

¹¹⁴ Crowley, M. A. *An Introduction to the WTO and GATT*. - Federal Reserve Bank of Chicago: *Economic Perspectives*. 2003/27. No. 4, p. 44; van den Bossche, pp 36-37. See also: Art. 1 of The Agreement Establishing the World Trade Organization.

¹¹⁵ van den Bossche, p. 37.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

In addition, the WTO law contains institutional and procedural rules, including those relating to decision-making and dispute settlement.¹¹⁸ Therefore, the Agreement Establishing the World Trade Organisation created the WTO as a new institutional organisation with a legal personality, legal capacity and sufficient privileges and immunities.¹¹⁹ It also endowed the WTO with decision-making processes, an institutional structure and distinctive functions.¹²⁰

The establishment of the WTO places the international trade system on a firm constitutional footing.¹²¹ For the first time, the pillars of international trade system rest on a fully fledged international organisation, with an international legal personality.¹²² It symbolises not so much the creation of an international trade organisation, but rather the commitment of the international trading community to a fully operational international trading system.¹²³

The WTO serves two principal functions. Firstly, it provides a set of multilaterally agreed rules governing policies and affecting both trade in goods and services and the protection of intellectual property.¹²⁴ Secondly, it provides a forum for administering the rules, settling trade disputes and pursuing negotiations to reduce trade barriers and strengthen and extend the multilateral rules.¹²⁵

The DSU creates a single integrated system for the resolution of dispute arising under any of the WTO covered agreements.¹²⁶ According to the Art. 3(7) of the DSU the aim of the WTO dispute settlement system is to secure a positive solution to a dispute. The system therefore prefers strongly solutions to disputes reached through consultations rather than adjudication.¹²⁷

The dispute settlement system of the WTO is a feature that distinguishes it from most other regimes of international law.¹²⁸ The WTO dispute settlement system is unique in international

¹¹⁸ van den Bossche, p. 37.

¹¹⁹ Matsushita *et al*, p. 14.

¹²⁰ *Ibid.*

¹²¹ Qureshi, p. 3.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Blackhurst, R. The Role of the Director-General and the Secretariat. - Dauton, M., Narlikar, A., Stern, R. M. (eds). The Oxford Handbook on the World Trade Organization. Oxford: Oxford University Press 2014, p. 141; Walker, A. What is the World Trade Organization? - BBC News. 16 Dec 2015. Available at: <http://www.bbc.com/news/business-35074942> (15.04.2017); What we do. The Website of the WTO. Available at: https://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm (15.04.2017).

¹²⁵ Blackhurst, p. 141; Walker; What we do. The Website of the WTO.

¹²⁶ van den Bossche and Prévost, p. 259.

¹²⁷ *Ibid.*, p. 262.

¹²⁸ Sacerdoti 2008, p. 598.

law and highly effective in assuring compliance with the WTO obligations.¹²⁹ It is centralized, exclusive, compulsory, binding, based on law and administered by independent adjudicatory bodies and it is effective also due to the multilateral surveillance of implementation.¹³⁰

There are three institutions that administer the WTO dispute settlement system. Firstly, the Dispute Settlement Body establishes panels, adopts panel and Appellate Body reports, supervises the implementation of recommendations and rulings and authorizes sanctions for failure to comply with dispute settlement decisions.¹³¹ Panel and Appellate Body reports adopted by the Dispute Settlement Body are binding to the parties to the dispute.¹³²

Secondly, the Appellate Body is a standing institution composed of seven persons appointed by the Dispute Settlement Body and it reviews panel rulings.¹³³ The Appellate Body can uphold, modify or reverse the legal findings and conclusions of the panel.¹³⁴

Thirdly, there are panels composed of usually three, but exceptionally five, well qualified governmental and/or non-governmental individuals selected from a roster of persons suggested by the WTO members.¹³⁵ For each case, the WTO Secretariat proposes the possible panelists who the disputing parties may reject.¹³⁶ If there is no agreement on the composition of the panel after 20 days, however, either party may request that the Director-General of the WTO appoints the panelists.¹³⁷

The WTO dispute settlement mechanism foresees up to four steps in the following order:

¹²⁹ Capling, A., Trommer, S. *The Evolution of the Global Trade Regime*. - Ravenhill, J. (editor). *Global Political Economy*. 5th ed. Oxford: Oxford University Press 2017. p. 132; Lamy, P. *The WTO in the Archipelago of Global Governance*. - A Speech given in Geneva, 14 March 2006. Available at: https://www.wto.org/english/news_e/sppl_e/sppl20_e.htm (15.04.2017).

¹³⁰ Sacerdoti 2008, p. 598.

¹³¹ Dispute Settlement Body. *The Website of the WTO*. Available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm (15.04.2017); Matsushita *et al*, p. 22; Stoll, P.-T. *World Trade Organization, Dispute Settlement*. 2014 - *Max Planck Encyclopedia of Public International Law*. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1556?rskey=Hdu5Cr&result=1&prd=EPIL> (15.04.2017), para. 12; van den Bossche and Prévost, p. 270.

¹³² Herdegen. *Principles of International Economic Law*. 2013, p. 257.

¹³³ Matsushita *et al*, p. 22; Stoll. *World Trade Organization, Dispute Settlement*. 2014, para. 18; van den Bossche and Prévost, pp 272-273.

¹³⁴ Appellate Body. *The Website of the WTO*. Available at: https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (15.04.2017).

¹³⁵ Matsushita *et al*, p. 22; Stoll. *World Trade Organization, Dispute Settlement*. 2014, paras 14-15; Trebilcock, p. 13, van den Bossche and Prévost, pp 271-272.

¹³⁶ Bernauer, T., Elsig, M., Pauwelyn, J. *Dispute Settlement Mechanism - Analysis and Problems*. - Dauton, M., Narlikar, A., Stern, R. M. (eds). *The Oxford Handbook on the World Trade Organization*. Oxford: Oxford University Press 2014, p. 487.

¹³⁷ Bernauer, Elsig and Pauwelyn, p. 487.

- 1) Consultations to attempt to settle the dispute amicably.¹³⁸
- 2) Third-party adjudication by a panel that decides whether a WTO member's conduct violates the WTO treaty.¹³⁹
- 3) The possibility of an appeal (at the request of either party) to be submitted to the Appellate Body.¹⁴⁰
- 4) Implementation and enforcement of the recommendations and rulings adopted by the Dispute Settlement Body.¹⁴¹ Within 30 days after adoption of the Panel or the Appellate Body report, the member concerned has to notify its intent to implement the recommendations.¹⁴² Despite the sometimes ambiguous language of the DSU with misleading terms like "recommendation", the member found in breach of the WTO law clearly has an obligation of full compliance in terms of withdrawing the wrongful measure.¹⁴³

In conclusion, since 1995 the WTO has adopted a central role in international trade law and important role in international law in general. In the next chapter the practice of treaty interpretation in the WTO dispute settlement will be analysed.

¹³⁸ Bernauer, Elsig and Pauwelyn, p. 487; Stoll. World Trade Organization, Dispute Settlement. 2014, paras 23-25; Trebilcock, p. 13; van den Bossche and Prévost, p. 274.

¹³⁹ Bernauer, Elsig and Pauwelyn, p. 487; Stoll. World Trade Organization, Dispute Settlement. 2014, paras 26-32; Trebilcock, p. 13; van den Bossche and Prévost, p. 274.

¹⁴⁰ Bernauer, Elsig and Pauwelyn, p. 487; Stoll. World Trade Organization, Dispute Settlement. 2014, paras 33-36; Trebilcock, p. 13; van den Bossche and Prévost, p. 274.

¹⁴¹ Bernauer, Elsig and Pauwelyn, p. 487; Stoll. World Trade Organization, Dispute Settlement. 2014, paras 37-41; Trebilcock, p. 13; van den Bossche and Prévost, p. 274.

¹⁴² Art. 21(3) of the DSU.

¹⁴³ Herdegen. Principles of International Economic Law. 2013, p. 257.

2. The fragmented practice of treaty interpretation in the WTO dispute settlement

The present chapter analyses whether the practice of the WTO dispute settlement regarding the treaty interpretation is following the Art. 31 of the VCLT. Firstly, the treaty interpretation methods will be analysed (section 2.1.) and, secondly, it will be explained how relevant or irrelevant other rules of international law are while interpreting a treaty in the WTO dispute settlement (section 2.2.).

2.1. The fragmented practice of the Art. 31(1) of the VCLT

During the practice of treaty interpretation there have been adopted different approaches for that. In the next section (section 2.1.1.) it will be explained based on legal doctrine and practice which are the treaty interpretation methods required by the Art. 31(1) of the VCLT. It will also be analysed which of the methods are applied in the WTO dispute settlement (section 2.1.2.). Last but not least, the conclusions on the treaty interpretation approach adopted by the WTO dispute settlement will be made (section 2.1.3.).

2.1.1. The meaning of the Art. 31(1) of the VCLT

The Art. 31(1) is the foundation of the method of treaty interpretation.¹⁴⁴ The interpretation of a treaty is a process to clarify meanings of particular words or terms used in a treaty.¹⁴⁵ The Art. 31(1) of the VCLT states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The ICJ has acknowledged the Art. 31(1) of the VCLT to constitute customary international law¹⁴⁶ and the WTO Appellate Body has stated the same in

¹⁴⁴ Sorel, J.-M., Boré Eveno, V. Art. 31, para. 29. - Corten and Klein.

¹⁴⁵ Herdegen. Interpretation in International Law. 2013, para. 1; Pauwelyn 2003, p. 245; Zhang, N. Holistic Approach of Treaty Interpretation: A Critique on *China-Rare Earths*. - Canadian Social Science 2015/11. No. 8, p. 18.

¹⁴⁶ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, para. 41; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803, para. 23; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045, para. 18; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, pp 645-646, para. 37. See also: Evans, M. D. International Law. 4th ed. Oxford: Oxford University Press 2014, p. 179, Hollis, D. B. (editor). The Oxford Guide to Treaties. Oxford: Oxford University Press 2014, p. 476; van Damme 2009, p. 50.

their reports.¹⁴⁷ These treaty interpretation methods laid down in the Art. 31(1) of the VCLT constitute a single framework for treaty interpretation and can now be identified as generally applicable and that those rules should be understood and used by all engaged in treaty interpretation.¹⁴⁸

The Art. 31(1) of the VCLT has four main elements that have to be considered while interpreting a treaty - “ordinary meaning”, “context”, “object and purpose” and “good faith”. In the following paragraphs the meanings of these elements will be explained.

Firstly, there is the textual (the “ordinary meaning”) method to treaty interpretation.¹⁴⁹ The textual approach will give meaning to words, for example, by looking these words up in a dictionary and trying to give the words, as they are used in a particular context, their “ordinary meaning”.¹⁵⁰ It is important that the ordinary meaning is most likely to reflect what the parties intended.¹⁵¹ The intention of the parties is expressed in the words used by them in the light of the surrounding circumstances.¹⁵² This is supported by the scholars who believe that the text of the treaty is the authentic expression of the intentions of the parties.¹⁵³ This approach centers on the actual text of the agreement and emphasises the analysis of the words used.¹⁵⁴

Secondly, there is the teleological (the “object and purpose”) method to treaty interpretation.¹⁵⁵ This approach finds that the most important is to examine the declared or apparent objects and purposes of the treaty.¹⁵⁶ Teleological approach has the effect of underlining the role of the judge or arbitrator, since he or she will be called upon to define the

¹⁴⁷ See for example: Appellate Body Report. *United States - Standards for Reformulated and Conventional Gasoline*. 1996. WT/DS2/AB/R, p. 3 at 16; Appellate Body Report. *Japan - Alcoholic Beverages II*. 1996. WT/DS8,10-11/AB/R, p. 10-12; Appellate Body Report. *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*. 2005. WT/DS285/AB/R.

¹⁴⁸ Gardiner, R. K. *Treaty Interpretation*. 2nd ed. Oxford: Oxford University Press 2015, p. 6.

¹⁴⁹ Evans, p. 179.

¹⁵⁰ Sorel, J.-M., Boré Eveno, V. Art. 31, para. 41. - Corten and Klein; Elsig and Pauwelyn, p. 8.

¹⁵¹ Aust, A. *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press 2000, p. 188.

¹⁵² McNair, A. *Law of Treaties*. 2nd ed. Oxford: Clarendon Press 1961, p. 365.

¹⁵³ Draft Articles on the Law of Treaties with Commentaries. - Yearbook of the International Law Commission. Vol. II. 1966, Art. 27, para. 2; Shaw, p. 932; Evans, p. 178.

¹⁵⁴ Shaw, p. 932.

¹⁵⁵ Brownlie, I. *Principles of Public International Law*. 7th ed. New York: Oxford University press 2008, p. 635; Evans, p. 179.

¹⁵⁶ Draft Articles on the Law of Treaties with Commentaries, Art. 27, para. 2; Evans, p. 178; Klabbers, J. *Treaties, Object and Purpose*. 2006. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1681?rkey=gPP2wz&result=1&prd=EPIL> (15.04.2017), para. 3; Shaw, p. 932.

object and purpose of the treaty.¹⁵⁷ Meaning is then given to the treaty with less reference to the linguistic meaning of words or subjective intent of the drafters and more with the spirit of the treaty in mind, in an attempt to give maximum effect to the treaty's underlying normative values.¹⁵⁸ However, such value-based interpretation is probably the approach that risks the most fragmentation or conflict between tribunals: if investment tribunals interpret pro investors; human rights tribunals interpret pro *homine* and the WTO Appellate Body and panels construe pro traders, the risk of inconsistent outcomes is higher.¹⁵⁹ Having regard to the object and purpose is more for the purpose of confirming an interpretation.¹⁶⁰ If an interpretation is incompatible with the object and purpose, it may well be wrong.¹⁶¹ Thus, although Art. 31(1) of the VCLT contains both the textual and the teleological methods, it gives precedence to the textual.¹⁶²

Thirdly, the VCLT 31(1) explicitly adds to the approaches named earlier that the treaty has to be interpreted in its context. It means that the interpreter of any phrase in a treaty has to look at the treaty as a whole and, as the Art. 31(2) demonstrates, even beyond that.¹⁶³ The entire text of the treaty is to be taken into account as context, including the title, preamble and annexes and any protocol to it, and the systematic position of the phrase in question within that ensemble.¹⁶⁴ Interpretative value can be found in the position of a particular word in a group of words or in a sentence, of a particular phrase or sentence within a paragraph, of a paragraph within an article or within a whole set of provisions, of an article within or in relation to the whole structure or scheme of the treaty.¹⁶⁵ The systematic structure of a treaty is thus of equal importance to the ordinary linguistic meaning of the words used, in order to determine its true meaning.¹⁶⁶

Fourthly, the Art. 31(1) of the VCLT also adds that the treaty has to be interpreted in good faith. According to the most fundamental rule of the law of treaties, every treaty must be performed in good faith.¹⁶⁷ Since interpreting a treaty is a necessary element of its performance, logic requires that good faith should be applied also to the interpretation of

¹⁵⁷ Shaw, p. 933.

¹⁵⁸ Dörr, O., Schmalenbach, K. (eds). Vienna Convention on the Law of Treaties. A Commentary. Heidelberg: Springer 2012, Art. 31, para. 55; Elsig and Pauwelyn, p. 9.

¹⁵⁹ Elsig and Pauwelyn, p. 9.

¹⁶⁰ Aust 2000, p. 188.

¹⁶¹ *Ibid.*

¹⁶² Aust 2000, p. 188; O'Connell, D. P. International Law. 2nd ed. London: Stevens & Sons 1970, p. 255.

¹⁶³ Dörr and Schmalenbach, Art. 31, para. 44.

¹⁶⁴ Brownlie, p. 633; Dörr and Schmalenbach, Art. 31, para. 45.

¹⁶⁵ Dörr and Schmalenbach, Art. 31, para. 45.

¹⁶⁶ *Ibid.*, para. 44.

¹⁶⁷ Art. 26 of the VCLT.

treaties.¹⁶⁸ The entire process of interpretation - i.e. when examining the text, the context, object and purpose - has to be conducted in good faith.¹⁶⁹

Another question is how these rules have to be applied. Does the court have to consider in every case all three approaches in good faith? Or is it enough to use only one of the methods if this gives a satisfying solution? This was actually explained by the ILC already in 1966 to clear that this article is not a hierarchical order for the application of the various elements of interpretation.¹⁷⁰ The article itself is also entitled “General rule of interpretation”, not “General rules” in the plural, because the ILC desired to emphasize that the process of interpretation is a single closely integrated rule.¹⁷¹ This approach is also called a holistic approach.¹⁷² A holistic approach to treaty interpretation would require, thus, reaching a conclusion on the ordinary meaning of the term at issue only upon the examination of all the relevant elements (taken as a whole), rather than examining each element in turn until the meaning of the term at issue is revealed.¹⁷³

The major international courts have unceasingly relied on the basics of the Art. 31 of the VCLT.¹⁷⁴ The ICJ is always referring to the Art. 31(1) of the VCLT (whether the parties of the case are also parties to the VCLT or not) and it is using all of the interpretation methods named in the Art. 31(1) of the VCLT. Some examples of these cases are: *Territorial Dispute*¹⁷⁵, *Sovereignty over Pulau Ligitan and Pulau Sipadan*¹⁷⁶, *Dispute Regarding Navigational and Related Rights*¹⁷⁷, *Whaling in the Antarctic*¹⁷⁸ and *Maritime Dispute*¹⁷⁹. In conclusion, the ICJ has never explicitly expressed that it is using the holistic approach, but it has also never explicitly stated that the methods laid down in the Art. 31(1) of the VCLT are hierarchical. But in these cases the ICJ is actually always applying the interpretation methods

¹⁶⁸ Aust 2000, p. 187; Dörr and Schmalenbach, Art. 31, para. 60.

¹⁶⁹ Dörr and Schmalenbach, Art. 31, para. 60.

¹⁷⁰ Draft Articles on the Law of Treaties with Commentaries, Art. 27, para. 8.

¹⁷¹ *Ibid.*

¹⁷² Elsig and Pauwelyn, p. 4; Gardiner, p. 8.

¹⁷³ Gruszczynski, p. 43; Ortino, p. 131; van Damme 2009, p. 33; Abi-Saab, G. The Appellate Body and Treaty Interpretation - Sacredoti, G., Yanovich, A., Bohanes, J. (eds). The WTO at Ten - The Contribution of the Dispute Settlement System. Cambridge: Cambridge University Press 2006, p. 459; Gardiner, p. 10.

¹⁷⁴ Sorel, J.-M., Boré Eveno, V. Art. 31, para. 31. - Corten and Klein.

¹⁷⁵ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I. C. J. Reports 1994, p. 6, paras 41-56.

¹⁷⁶ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, pp 645-646, paras 37-52.

¹⁷⁷ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 2009. I.C.J. Reports 214, p. 237, paras 42-84.

¹⁷⁸ *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226, paras 51-97.

¹⁷⁹ *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 3, paras 58-70.

in this order they are written down in the Art. 31(1) of the VCLT. Based on the previous case law it can be concluded that in these cases the ICJ is using rather the holistic approach.

The view of the ICJ has been shared by several other international courts and tribunals.¹⁸⁰ The ECtHR used the VCLT rules in the case *Golder v. United Kingdom*: “In the way in which it is presented in the “general rule” in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation”.¹⁸¹ The court analyses the context, the text and the object and purpose of the treaty while interpreting it.¹⁸² Also, for instance, the ITLOS¹⁸³, the ICTY¹⁸⁴ and the ICTR¹⁸⁵ have followed the approach taken by the ICJ.

However, the practice of treaty interpretation approaches is not so clear and unified as sometimes presupposed. It has been claimed that in modern international law, the textualism has actually taken the central position in treaty interpretation.¹⁸⁶ The last ILC Special Rapporteur on the law of the treaties Sir H. Waldock has also stated that the ILC has actually a strong predilection for textual interpretation.¹⁸⁷ Textualism mandates that a legal text must be read based upon the meaning of its terms.¹⁸⁸

Also, international jurisprudence supports largely the proposition that textualism is the dominant interpretive approach, despite the holistic approach formally enunciated by the

¹⁸⁰ Gardiner, p. 18.

¹⁸¹ ECtHR 4451/70, *Golder v. United Kingdom*, para. 30.

¹⁸² ECtHR 4451/70, *Golder v. United Kingdom*, paras 31-34. See also: ECtHR 8793/79, *James and others v. The United Kingdom*, paras 42 and 61; ECtHR 15318/89, *Loizidou v. Turkey*, para. 73; ECtHR 13229/03, *Saadi v. The United Kingdom*, paras 61 ff.

¹⁸³ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion). 2011; *Case no. 1 of the “Saiga” (Saint Vincent and the Grenadines v. Guinea)*, Case No. 17; Judgment of 4 December 1997, paras 58-71.

¹⁸⁴ *The Prosecutor v. Dusko Tadic*, Judgment of 15 July 1999, Case No. IT-94-1-A, A.Ch, paras 71-95; *The Prosecutor v. Slavko Dokmanović*, Judgment of 22 October 1997, Case No. IT-95-13a, para. 40; *The Prosecutor v. Aleksovski*, Judgment of 24 March 2000, Case No. IT-95-14/1-T, para. 98.

¹⁸⁵ *The Prosecutor v. Joseph Kanyabashi*, Judgment of 18 June 1997, Case No. ICTR-96-15T, paras 13 ff; *The Prosecutor v. Théoneste Bagosora*, Judgment of 8 June 1998, Case No. ICTR-98-37-A, paras 28-29.

¹⁸⁶ Jennings, R., Watts, A. *Oppenheim’s International Law. Volume 1: Peace*. 9th ed. Harlow: Longman 1992, p. 1271; Zarbiyev, F. *A Genealogy of Textualism in Treaty Interpretation*. - Bianchi, A., Peat, D., Windsor, M. (eds). *Interpretation in International Law*. Oxford: Oxford University Press 2015, p. 254.

¹⁸⁷ Third Report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur. Extract from the Yearbook of the International Law Commission: 1964, vol. II. A/CN.4/167 and Add.1-3. Available at: http://legal.un.org/ilc/documentation/english/a_cn4_167.pdf (15.04.2017), pp 54, 56; Yearbook of the International Law Commission. 1964. Vol I. Summary records of the sixteenth session 11 May-24 July 1964. A/CN.4/SER.A/1964. Available at: http://legal.un.org/ilc/publications/yearbooks/english/ilc_1964_v1.pdf (15.04.2017), p. 314; Zarbiyev, p. 256.

¹⁸⁸ Fitzmaurice, G. *The Law and Procedure of the International Court of Justice 1951: Treaty Interpretation and Other Treaty Points*. - *British Yearbook of International Law*. 1957/33, pp 203, 212; Zarbiyev, p. 254.

ILC.¹⁸⁹ For instance, the object and purpose of a treaty is often regarded not as one of the starting points in the interpretive process but as an auxiliary and largely dispensable element that might optionally be used to confirm the ordinary meaning of the terms of the treaty, or to clarify those terms when they are deemed ambiguous.¹⁹⁰

This kind of approach was taken, for instance, by the ICJ in cases *Kasikili/Sedudu Island*¹⁹¹ and *Oil Platforms*¹⁹².¹⁹³ Furthermore, an ICDIF tribunal has explained the choice of textual approach very clearly in the case *RSM Production Corporation v. Grenada*: “This strict textual approach, i.e., going no further than the ordinary meaning of the text of the treaty, is regarded as fundamental in international law. Even though the International Law Commission, in its Final Draft Articles (at page 685), suggested that the “process of interpretation is a unity and that the provisions of the article [now Article 31] form a single, closely integrated rule,” nevertheless, the article itself indicates a clear, logical interpretive order in which textual interpretation is primary. Article 31, when read in conjunction with Articles 32 and 33 of the Vienna Convention reveals an interpretive structure in which subsequent practice and the other two methods of treaty interpretation, subjective and teleological, are supplementary in nature. They are to be used to assist in the interpretation when the textual method is insufficient.”¹⁹⁴

To make it even more complicated, there are courts who prefer other methods of interpretation. For instance, the CJEU has developed very early a teleological interpretation in favour of Community treaties, often leading it to consider any other rule of interpretation as suspicious and liable to conflict with its own objectives.¹⁹⁵ Thus, the CJEU privileges the teleological interpretation for Community treaties, whilst resorting to other possibilities when dealing with non-Community treaties.¹⁹⁶ The starting point of this approach may be found in the case of *De Gezamenlijke Steenkolenmijnen in Limburg v. ECSC High Authority* in which

¹⁸⁹ Zarbiyev, p. 256.

¹⁹⁰ Zarbiyev, p. 256-257.

¹⁹¹ *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999 (II), p. 1059, paras 21-75.

¹⁹² *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 803.

¹⁹³ Zarbiyev, p. 257.

¹⁹⁴ *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, para. 383.

¹⁹⁵ Sorel, J.-M., Boré Eveno, V. Art. 31, para. 35. - Corten and Klein; Ehlermann, C.-D. Six Years on the Bench of the “World Trade Court”: Some Personal Experiences as Member of the Appellate Body of the World Trade Organization. - *Journal of World Trade*. 2002/36. Issue 4, p. 616.

¹⁹⁶ Sorel, J.-M., Boré Eveno, V. Art. 31, para. 34. - Corten and Klein.

the court rejected the ordinary meaning of terms in favour of the Community meaning which it constructed itself.¹⁹⁷

In conclusion, it is very clear that the Art. 31(1) of the VCLT includes four important elements that have to be taken into account while interpreting a treaty - “ordinary meaning”, “context”, “object and purpose” and “good faith”. Nevertheless, it is not so clear if this rule is a strict holistic approach or should other approaches also be accepted. Even though the ILC tried to make it work as a holistic rule, it has turned out more as an approach where textualism is very often preferred to other methods of interpretation. In the following section it will be analysed which is the approach used in the WTO dispute settlement.

2.1.2. The Art. 31(1) of the VCLT in the WTO dispute settlement

In the practice of the WTO dispute settlement the Art. 31(1) of the VCLT have been regularly referred to.¹⁹⁸ The main reason for these references is the Art. 3(2) of the DSU. According to the Art. 3(2) of the DSU the dispute settlement system of the WTO “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”.¹⁹⁹ Art. 3(2) of the DSU confirms the principle of *jura novit curia*, because the panels and the Appellate Body can decide themselves how to interpret the WTO covered agreements as long as they respect the customary principles of treaty interpretation.²⁰⁰ However, the practice how the panels and the Appellate Body of the WTO refer to the VCLT Art. 31(1) and how they interpret this specific provision is not unified.

On the one hand, there are cases where the panels and the Appellate Body of the WTO tend to promote the text of the treaty. In some of the cases the panel or the Appellate Body have mentioned also the other methods of interpretation, but have stated that the textual approach has to be the first one used. This means that the WTO Appellate Body and panels have

¹⁹⁷ Sorel, J.-M., Boré Eveno, V. Art. 31, para. 34. - Corten and Klein; CJEU C-30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v. ECSC High Authority*, p. 19. Similar approach has been taken later, for example, in the following cases: CJEU C-312/91, *Metalsa Srl, penal procedure v. Gaetano Lo Presti*, para. 12; CJEU C-416/96, *Nour Eddine El-Yassini v. Secretary of State for Home Department*, para. 47; CJEU C-268/99, *Aldona Malgorzata Jany and others v. Staatssecretaris van Justitie*, para. 35.

¹⁹⁸ It has been referred that the interpretation of a treaty should take place according to the rules layed down in the VCLT. See for example Appellate Body Report. *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and other items*. 1998. WT/DS56/AB/R, para. 47; Appellate Body Report. *European Communities - Customs Classification of Certain Computer Equipment*. 1998. WT/DS62,67-68/AB/R, para. 83; etc.

¹⁹⁹ Art. 3(2) of the DSU. See also: van den Bossche and Prévost, p. 263.

²⁰⁰ van Damme 2009, p. 22.

interpreted the Art. 31(1) of the VCLT as it was a hierarchical list of interpretation methods, where the textual method is the preferred one.

For instance, in the *US - Shrimp*²⁰¹ the Appellate Body found that the Panel had not followed all of the steps of applying the customary rules of interpretation of public international law as required by the Art. 3(2) of the DSU.²⁰² The Appellate Body gave an instruction that a treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted.²⁰³ It continued to explain that where the meaning imparted by the text itself is equivocal or inconclusive or where confirmation of the correctness of the reading of the text itself is desired then the object and purpose of the treaty as a whole should be sought.²⁰⁴ Thus, the Appellate Body adopted the hierarchical approach in the *US - Shrimp* case.

Also, in the *US - Line Pipe* it was clearly expressed by the Appellate Body that the sentence they were interpreting does not have one certain meaning alone and they must seek the meaning of the terms of this provision in their context and in the light of the object and purpose of the agreement.²⁰⁵ Therefore, the Appellate Body showed again that they start the interpretation process with textual approach and only in case this does not give a solution they move to the other ones.

Another example is the case *EC - Sardines*. One of the issues disputed between the parties was the meaning of the term “standard” as used in the Agreement on TBT.²⁰⁶ The Appellate Body decided the issue by application of different textual methods.²⁰⁷ For instance, the Appellate Body considered the definition of the term “standard” in the ISO/IEC Guide, but did not agree with the consensus requirement provided in this definition.²⁰⁸ In conclusion, the Appellate Body decided the meaning of term “standard” without reference to any other elements such as the context and the purpose or object of the TBT agreement.²⁰⁹

²⁰¹ All the short titles used in the current thesis for the WTO dispute settlement cases are the official short titles from the list of cases on the WTO website (https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

²⁰² Appellate Body Report. *United States - Import Prohibition of Certain Shrimp and Shrimp Products*. 1998. WT/DS58/AB/R, para. 114.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Appellate Body Report. *United States Deinitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*. 2001. WT/DS202/AB/R, para. 251.

²⁰⁶ Gruszczynski, p. 45.

²⁰⁷ *Ibid.*, p. 46.

²⁰⁸ Appellate Body Report. *European Communities - Trade Description of Sardines*. 2002. WT/DS231/AB/R, paras 225-227.

²⁰⁹ Gruszczynski, p. 46.

In the *US - Gambling* the Panel and the Appellate Body inquired into the character of online gambling and betting services.²¹⁰ They had to decide whether these services should be regarded as sporting activities or as other recreational services.²¹¹ The Panel considered first the definitions of the key terms and then viewed the terms in the context of the treaty.²¹² Later the Appellate Body criticised the way how the Panel had earlier dealt with the problem.²¹³ It found that the Panel's findings were premature.²¹⁴ The Appellate Body stated that a panel may start with the dictionary definitions to find a certain meaning of a term, but dictionaries alone are not necessarily capable of resolving complex questions of interpretation.²¹⁵

However, the Appellate Body did not blame the Panel for preferring textual methods to other methods named in the Art. 31(1) of the VCLT. In its own findings the Appellate Body first concentrated on the text and found that the language was inconclusive.²¹⁶ Secondly, the Appellate Body examined the context and concluded that it did not clearly reveal the scope of the US concessions.²¹⁷ And after this the Appellate Body turned to the object and purpose of the GATS to obtain further guidance for their interpretation.²¹⁸ In conclusion, the Appellate Body did not use all the methods laid down in the Art. 31(1) of the VCLT as a holistic approach, but as a hierarchical approach: it used all of these just because the first and second methods were not enough to interpret the provision.

Similar approach was adopted by the Panel in the *EC - Chicken Cuts*, but later the Appellate Body adopted the holistic approach instead. The Panel found quite clearly that the object and purpose should be considered after the treaty interpreter had determined the meaning of the words constituting the treaty obligation in question when read in their context.²¹⁹ But later this Panel report was criticised by the Appellate Body which referred that the Panel should have used the holistic approach.²²⁰

²¹⁰ Gruszczynski, p. 42.

²¹¹ *Ibid*, p. 42.

²¹² Panel Report. *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*. 2004. WT/DS285/R, para. VI.496.

²¹³ Appellate Body Report. *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*. 2005. WT/DS285/AB/R, paras 164-168.

²¹⁴ *Ibid*, paras 167.

²¹⁵ *Ibid*, para. 164.

²¹⁶ *Ibid*, para. 166.

²¹⁷ *Ibid*, para. 181.

²¹⁸ *Ibid*, para. 187.

²¹⁹ Panel Report. *European Communities - Custom Classification of Frozen Boneless Chicken Cuts*. 2005. WT/DS286/R, para. VII.176.

²²⁰ Appellate Body Report. *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*. 2005. WT/DS269,286/AB/R, paras 175-176.

In the case *EC - Approval and Marketing of Biotech Products* the Panel uses clearly textual approach and even often referred to dictionary. For instance, the Panel used the Oxford English Dictionary to determine, for example, the meaning of “to arise from”, “pests”, “disease”, “food”, “additives”, “contaminant”, “toxin”, “allergen”, “allergy”²²¹. The Appellate Body has also observed earlier that the dictionaries are a useful starting point for the analysis of “ordinary meaning” of a treaty term, but they are not necessarily dispositive.²²²

Nevertheless, the fact that the WTO Appellate Body and panels are relying in their interpretation too much on dictionaries has been criticised more.²²³ Related to *EC - Approval and Marketing of Biotech Products* case it has been criticised that the Panel referred to the Oxford English Dictionary while determining whether crops grown for purposes other than human or animal consumption can be regarded as food.²²⁴ It has been found that the result of such interpretation is that the Panel came up with a definition of food which is completely unrelated to its understanding in the SPS field, where food is always defined in reference to human consumption.²²⁵

On the other hand, in some cases the WTO Appellate Body and panels have adopted the holistic approach. For instance, in *Japan - Alcoholic Beverages II* it was noted by the Appellate Body that the interpretation must be based above all upon the text of the treaty²²⁶, but it also added: “The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions.”²²⁷

In the case *US - Section 301 Trade Act* it was clearly held by the Panel that the elements referred to in the Art. 31 of the VCLT - the text, context and object-and-purpose, as well as good faith - are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order.²²⁸

²²¹ Panel Report. *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*. 2006. WT/DS291-293/R, paras 7.224, 7.238, 7.277, 7.291, 7.297, 7.312, 7.321 and 7.334.

²²² Appellate Body Report. *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*. 2005. WT/DS269,286/AB/R, para. 175.

²²³ Gruszczynski, p. 43; Ehlermann, p. 616.

²²⁴ Gruszczynski, p. 45.

²²⁵ *Ibid.*

²²⁶ Appellate Body Report. *Japan - Alcoholic Beverages II*. 1996. WT/DS8,10-11/AB/R, p. 11.

²²⁷ *Ibid.*, p. 12.

²²⁸ Panel Report. *United States - Sections 301-310 of the Trade Act of 1974*. 1999. WT/DS152/R, para. VII.1442.

As referred earlier in the current section, the WTO Appellate Body followed for instance the holistic approach in the case *EC - Chicken Cuts*. The WTO Appellate Body found: “Interpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components.”²²⁹ In conclusion, the WTO Appellate Body agreed with the interpretation made by the Panel, but it did not do it in the same way as the Panel.

Another example of a case where the Appellate Body adopted the holistic approach is the *US - Continued Zeroing* where the Appellate Body stated that the principles of interpretation that are set out in the Art. 31 and 32 of the VCLT are to be followed in a holistic fashion.²³⁰ It explained further that the interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective.²³¹ A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it.²³²

A very clear example of the Appellate Body using the holistic approach is also *China - Publications*. It states: “In this respect, we note that the purpose of the interpretative exercise is to narrow the range of possible meanings of the treaty term to be interpreted, not to generate multiple meanings or to confirm the ambiguity and inconclusiveness of treaty obligations. Rather, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis, bearing in mind that treaty interpretation is an integrated operation, where interpretative rules and principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.”²³³

In *Argentina - Financial Services* the Panel also applied a holistic approach, even though it was not explicitly stated. In its report the Panel expressed: “Nevertheless, before turning to the context, we recall that Article 31.1 of the 1969 Vienna Convention on the Law of Treaties

²²⁹ Appellate Body Report. *European Communities - Customs Classification of Frozen Boneless Chicken Cuts*. 2005. WT/DS269,286/AB/R, para. 176.

²³⁰ Appellate Body Report. *United States - Continued Existence and Application of Zeroing Methodology*. 2008. WT/DS350/AB/R, para. 268.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ Appellate Body Report. *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*. 2009. WT/DS363/AB/R, para. 399.

states that the starting point for an interpretative exercise is the “the ordinary meaning to be given to the terms of the treaty”. Article 31.1 of the Vienna Convention adds that the basis of interpretation shall be not only the ordinary meaning of the terms but also “their context and in the light of [the treaty's] object and purpose”.²³⁴

Moreover, there are cases where it is actually hard to say which approach was being used. They use all the methods named in the Art. 31(1) of the VCLT and they do it in the sequence of the methods named in the article. But the panels or the Appellate Body do not state that it is holistic or hierarchical approach. For example, in *China - Electronic Payment Services*, the Panel explained that it will first determine the ordinary meaning of relevant terms used, then turn to the context and, finally, consider the object and purpose of the GATS and the WTO Agreements.²³⁵ It might seem like this is a hierarchical approach, because the methods laid down in the Art. 31(1) of the VCLT are followed in a certain order. But on the other hand it can be understood that the Panel is rather just stating how is it going to interpret the term and later all methods have equal weight.

In conclusion, the treaty interpretation in the practice of the WTO dispute settlement is not unified - on the one hand, there are cases where the panels and the Appellate Body prefer hierarchical approach and, on the other hand, there are cases where they have clearly adopted holistic approach. Furthermore, there are cases where it is hard to understand which approach is being used. It is also hard to argue that the practice of the panels and the Appellate Body is moving towards one of the approaches. In the next section it will be analysed whether this is in accordance with the general rules of treaty interpretation that are laid down in the Art. 31(1) of the VCLT and whether the criticism towards the WTO dispute settlement is justified.

2.1.3. Conclusions on the practice of the Art. 31(1) of the VCLT in the WTO dispute settlement

In the current section it will be analysed whether the practice of the WTO dispute settlement is in accordance with the interpretation methods that are laid down in the Art. 31(1) of the VCLT and used in practice of other international courts and tribunals. Also, different opinions of scholars on this issue will be discussed.

²³⁴ Panel Report. *Argentina - Measures Relating to Trade in Goods and Services*. 2015. WT/DS463/R, para. 7.204.

²³⁵ Panel Report. *China - Measures Affecting Electronic Payment Services*. 2012. WT/DS413/R, para. VII.74.

In the previous section (section 2.1.2.) it was explained that in some cases the WTO Appellate Body and panels have adopted the holistic approach and in other cases the textual approach. There are some scholars stating that the approach of the Appellate Body and the panels is not always compatible with the standards established by the Art. 31 of the VCLT, because in some reports they have not adopted the holistic approach.²³⁶ It has been mostly reasoned that the approach laid down in the Art. 31 of the VCLT is actually meant to be a holistic interpretation.²³⁷ There is usually no single “ordinary” meaning of a word and, thus, there is the need for a direct link to the context and the treaty’s object and purpose.²³⁸ That linkage immediately qualifies any impression that the ordinary meaning is simply a literal approach.²³⁹ Context and object and purpose are not additional or optional elements, but pointers to the appropriate ordinary meaning.²⁴⁰

It has been claimed that the textual method obviously reduces the importance of the purpose and object of a treaty, as an interpreter is required to consider those elements only in order to confirm the results obtained through purely textual methods to clarify a text which remains equivocal or inconclusive after the application of textual methods.²⁴¹ Furthermore, a former member of the Appellate Body has also stated that in following the approach of the Art. 31 of the VCLT, the Appellate Body has attached the greatest weight to the ordinary meaning of the terms of the treaty.²⁴² Even though the context has less weight, but is certainly more often used and relied upon than the object and purpose.²⁴³

Nevertheless, in the section 2.1.1. it was explained that also other international courts and tribunals have adopted the textual approach. Furthermore, it has been accepted in legal literature that the text is usually getting the most attention while interpreting a treaty. Thus, I do not agree with the criticism towards the WTO. In these articles it is portrayed as the WTO dispute settlement is the only one applying textual approach and all the others apply holistic approach. But if one sees the practice of treaty interpretation on a broader scale, it is clear that the practice of treaty interpretation is fragmented in general, not only related to the WTO.

²³⁶ See for example: Gruszczynski, p. 36; Ortino; Chung; McRae 2006.

²³⁷ See for instance: Abi-Saab 2006, p. 459; Gruszczynski, p. 43; Ortino, p. 131; van Damme 2009, p. 33. See also the section 2.1.1. of the current master’s thesis.

²³⁸ Hollis, p. 480.

²³⁹ *Ibid.*

²⁴⁰ Elsig and Pauwelyn, p. 4; Hollis, p. 480-481.

²⁴¹ Gruszczynski, p. 42.

²⁴² Ehlermann, p. 615.

²⁴³ *Ibid.*

I also think that considering every single time the object and purpose of a WTO treaty could create even more problems. Namely, the object and purpose of a WTO treaty is probably related to the functioning of international trade. If this is considered too seriously, it could cause a contradiction with the problem will be analysed in the section 2.2. In the section 2.2. it will be explained how the WTO Appellate Body and panels do not always follow the Art. 31(3)(c) and they tend to emphasize only the trade rules and principles. However, if we strictly require the Appellate Body and panels every single time to analyse the object and purpose of a WTO treaty, the other rules of international law might be left with too little attention in the end.

In conclusion, there are cases where the WTO Appellate Body and the panels have clearly adopted the holistic approach of treaty interpretation. Also, there are cases where textual approach is preferred. Even though this fact has been criticised by many legal scholars, it does not seem to be a problem caused by the WTO. Namely, there are many other international courts and tribunals who use textual method for interpreting treaties and this has also been accepted in legal literature. Thus, it is impossible to say that the WTO dispute settlement is causing the fragmentation of international law concerning the practice of the Art. 31(1) of the VCLT.

2.2. The fragmented practice of the Art. 31(3)(c) of the VCLT

In the current section it will be analysed whether the WTO follows the Art. 31(3)(c) of the VCLT in its dispute settlement practice. Firstly, the meaning of the Art. 31(3)(c) of the VCLT will be explained based on legal doctrine and practice (section 2.2.1.). Secondly, the use of the Art. 31(3)(c) of the VCLT in the WTO dispute settlement will be analysed (section 2.2.2.). Thirdly, conclusions on the Art. 31(3)(c) of the VCLT in the WTO dispute settlement will be made (section 2.2.3.).

2.2.1. The meaning of the Art. 31(3)(c) of the VCLT

The Art. 31(3)(c) of the VCLT states that while interpreting a treaty together with the context there should be taken into account also any other relevant rules of international law applicable in the relations between the parties. This is called systemic integration and during this process international obligations are interpreted by reference to its normative environment or system

more broadly.²⁴⁴ All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside the rights and obligations established by other treaty provisions and rules of customary international law.²⁴⁵ None of these rules has any intrinsic priority against each other.²⁴⁶ The Art. 31(3)(c) of the VCLT is not restricted to general international law but extends to any relevant rules of international law applicable in the relations between the parties.²⁴⁷

But the principle of systemic integration goes further and it points to a need to take into account the normative environment also more widely.²⁴⁸ Whatever is their subject matter, treaties are a creation of the international legal system and their operation is based upon that fact.²⁴⁹ The normative element cannot be ignored and when interpreting the treaties, the principle of integration should be borne in mind.²⁵⁰ The rules need to be seen in a view of some comprehensible and coherent objective, to prioritize concerns that are more important at the cost of less important objectives.²⁵¹

The rule laid down in the Art. 31(3)(c) of the VCLT has a firm basis in the principle of good faith, because according to that principle every party to a treaty must in principle be presumed to intend to keep its treaty obligation in conformity with its other obligations under international law.²⁵²

This is all that the Art. 31(3)(c) of the VCLT requires: the integration into the process of legal reasoning - including reasoning by courts and tribunals - of a sense of coherence and meaningfulness.²⁵³ Often no formal reference to the Art. 31(3)(c) of the VCLT is necessary because other methods provide sufficiently the need to take into account the normative environment.²⁵⁴

²⁴⁴ Draft Articles on the Law of Treaties with commentaries, Art. 27, para. 16; Dörr and Schmalenbach, Art. 31, para. 89; Herdegen, *Principles of International Economic Law*, 2013, para. 12; Report of the Study Group of the International Law Commission, para. 413; Zhang, p. 18.

²⁴⁵ Report of the Study Group of the International Law Commission, para. 414.

²⁴⁶ *Ibid.*

²⁴⁷ Report of the Study Group of the International Law Commission, para. 422.

²⁴⁸ *Ibid.*, para. 415.

²⁴⁹ Dörr and Schmalenbach, Art. 31, para. 44.

²⁵⁰ Report of the Study Group of the International Law Commission, para. 419.

²⁵¹ *Ibid.*

²⁵² Dörr and Schmalenbach, Art. 31, para. 90. See also: Art. 26 of the VCLT.

²⁵³ Report of the Study Group of the International Law Commission, para. 419.

²⁵⁴ *Ibid.*, para. 421.

The systemic integration laid down in the Art. 31(3)(c) of the VCLT views the international legal order as one single system and allows drawing conclusions from that perspective.²⁵⁵ Thus, it has a great potential to be one of the means to mitigate the effects of the fragmentation of international law, since the treaty interpretation can on the basis of this rule transgress the borders of specialized regimes of international law and try to find a meaning for the terms in question that reflects the common basis of legal rules in an integrated system of international law.²⁵⁶ However, if the courts or tribunals do not use in practice the Art. 31(3)(c) it cannot also protect the international law against the fragmentation and can, furthermore, trigger the fragmentation of international law even more.²⁵⁷

The Art. 31(3)(c) consists of two important parts. Firstly, it states that “any other relevant rules of international law” has to be taken into account. Secondly, the provision continues that these rules have to be “applicable in the relations between the parties”. These requirements will be analysed separately.

Firstly, the requirement “any other relevant rules of international law” referred to in Art. 31(3)(c) of the VCLT does not seem to be limited to any particular sources of international law.²⁵⁸ The Art. 31(3)(c) of the VCLT directs the international courts and tribunals to take account of treaty provisions, customary international law and general principles of law as these are described as sources of international law according to the Statute of the ICJ.²⁵⁹ Furthermore, irrespective of the fact that the word “rules” would imply that only legally binding instruments can play a role under the Art. 31(3)(c), parts of international judicial practice seem to apply this condition somewhat less restrictively and also consider non-binding documents as material relevant for interpretation.²⁶⁰

Secondly, the requirement that the external rules are “applicable in the relations between the parties” presupposes that the latter are legally bound by those rules, either because they have given their consent to them as treaty rules, or, because they are addressed by them as binding customary rules or general principles of international law, or because they are bound for other reasons, such as acquiescence or unilateral declaration.²⁶¹

²⁵⁵ Dörr and Schmalenbach, Art. 31, para. 91.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ Dörr and Schmalenbach, Art. 31, para. 92; Pauwelyn 2003, p. 254.

²⁵⁹ Art. 38(1) of the Statute of the ICJ; Dörr and Schmalenbach, Art. 31, para. 92; Pauwelyn 2003, p. 254.

²⁶⁰ Dörr and Schmalenbach, Art. 31, para. 97.

²⁶¹ *Ibid.*, para. 101.

In practice there has arisen the question what to consider a party in this context. The VCLT defines a “party” as a state which has consented to be bound by the treaty and for which the treaty is in force.²⁶² It is actually a question whether it refers to the parties to the treaty or the parties to a particular dispute under that treaty.²⁶³ But it rather seems that the latter approach is more common and justified and the first approach seems hardly compatible with the overall structure of the Art. 31 of the VCLT.²⁶⁴

The Art. 31(3)(c) of the VCLT is referred to in the practice of international courts and tribunals and, thus, the systematic approach has been adopted also in practice. Some examples of cases where the ICJ has referred to the Art. 31(3)(c) of the VCLT are *Case Concerning the Right of Passage over Indian Territory*²⁶⁵, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*²⁶⁶, *Gabčíkovo-Nagymaros*²⁶⁷ and *Oil Platforms*²⁶⁸.

The systematic interpretation laid down in the Art. 31(3)(c) of the VCLT has been very often referred to by ECtHR. In *Golder v. United Kingdom*, the ECtHR referred to this article when it had to determine whether the Art. 6 of the ECHR guaranteed a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined.²⁶⁹ It was held that the reference to “relevant rules of international law” in the Art. 31(3)(c) of the VCLT includes general principles of law and especially general principles of law recognised by civilised nations.²⁷⁰

But the general principles of international law are not the only sources being referred to in the practice of the ECtHR. For example, the ECtHR has referred to another human rights treaties than ECHR in many court cases.²⁷¹ Furthermore, in the *Loizidou v. Turkey* case the ECtHR made reference also to certain acts of international organisations, another generally

²⁶² Art. 2(1)(g) of the VCLT.

²⁶³ Dörr and Schmalenbach, Art. 31, para. 103.

²⁶⁴ *Ibid.*

²⁶⁵ *Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India)*, I.C.J. Reports 1957, p. 125, pp 21-22.

²⁶⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16.

²⁶⁷ *Gabčíkovo-Nagymaros (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, para. 140.

²⁶⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 161, para. 41.

²⁶⁹ ECtHR 4451/70, *Golder v. United Kingdom*, paras 27-31.

²⁷⁰ *Ibid.*, para. 29.

²⁷¹ See for example ECtHR 35763/97, *Al-Adsani v. The United Kingdom*, para. 60; ECtHR 78028/01 and 78030/01, *Pini et al v Romania*, para. 139; ECtHR 39051/03, *Emonet et al v. Switzerland*, para. 65; ECtHR 34503/97, *Demir and Baykara v. Turkey*, paras 69-73.

recognised source of international law.²⁷² Pursuant to the Art. 31(3)(c), the ECtHR took account of two UN Security Council Resolutions and decisions of the Committee of Ministers of the Council of Europe, the European Community and the Commonwealth Heads of State.²⁷³

Also, the Iran - US Claims Tribunal has expressly deployed the Art. 31(3)(c) of the VCLT and has referred to a wide range of materials on the law of diplomatic protection in international law.²⁷⁴ And in the *MOX Plant* case in OSPAR Arbitration the tribunal made an express reference to the Art. 31(3)(c) of the VCLT.²⁷⁵ Nevertheless, it held that neither of the instruments referred by Ireland were in fact “rules of law applicable between the parties”.²⁷⁶ In the *Rhine Railway* arbitration the tribunal referred to the Art. 31(3)(c) of the VCLT and considered modern principles of international environmental law relevant for the interpretation of bilateral treaties concluded by Belgium and the Netherlands.²⁷⁷

In practice, the reports of the WTO Appellate Body and panels are not always in accordance with the Art. 31(3)(c) and of its interpretation by other international courts and tribunals. The next section will analyse it more precisely.

2.2.2. The Art. 31(3)(c) of the VCLT in the practice of the WTO dispute settlement

The relationship between the WTO rules and the other rules of international law is not always clear. It is generally accepted that customary international law and general principles of law are applicable within the WTO law, unless the WTO law expressly contains clearly deviating rules.²⁷⁸ It is also generally accepted that international law plays an important role in the interpretation of the provisions of the WTO law.²⁷⁹ The WTO rules should, if possible, be interpreted in such a way that they do not conflict with other rules of international law.²⁸⁰

²⁷² Pauwelyn 2003, p. 256.

²⁷³ *Ibid.* See also: ECtHR 15318/89, *Loizidou v. Turkey*.

²⁷⁴ *Esphahanian v. Bank Tejarat, Iran - US C.T.R.* Vol. 2. 1983-1, p. 157.

²⁷⁵ Report of the Study Group of the International Law Commission, para. 441; *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention*, Final Award (Ireland v. the United Kingdom) (2 July 2003) Permanent Court of Arbitration, ILM vol. 42 (2003), para. 101.

²⁷⁶ *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention*, Final Award (Ireland v. the United Kingdom) (2 July 2003) Permanent Court of Arbitration, ILM vol. 42 (2003), para. 104; Report of the Study Group of the International Law Commission, para. 441.

²⁷⁷ Dörr and Schmalenbach, Art. 31, para. 104. See also: *Arbitration regarding the Iron Rhine (“Ijzeren Rijn”) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005 - Reports of International Arbitral Awards. Vol. XXVII, pp 35-125, paras 57-60.

²⁷⁸ van den Bossche and Prévost, p. 8-9.

²⁷⁹ *Ibid.*, p. 9.

²⁸⁰ *Ibid.*

And, of course, in the practice of the WTO dispute settlement the Art. 31(3)(c) of the VCLT should be followed too, but in reality the practice of it is rather fragmented.

On the one hand, there is practice of the WTO dispute settlement that is in accordance with the Art. 31(3)(c) of the VCLT. In 1996 the WTO Appellate Body stated in its very first report that the WTO law “should not be read in clinical isolation from public international law”.²⁸¹ Therefore, the rules of general international law and rules of other regimes of international law (so-called non-WTO rules) should be applicable and relevant also in the WTO dispute settlement. There are cases where this statement and the Art. 31(3)(c) of the VCLT is referred to and followed by the panels or the Appellate Body of the WTO.

For instance, in the *US - Shrimp* case the Appellate Body made an extensive reference to international environmental law texts.²⁸² The Appellate Body took into account multilateral environmental agreements, including the Convention on Biological Diversity and the Convention on International Trade in Endangered Species, in interpreting the exception for measures relating to the conservation of “exhaustible natural resources” in the Art. XX(g) of the GATT.²⁸³ Relying on these international agreements, the Appellate Body found that the term “exhaustible natural resources” includes both living and non-living resources, and thus that the US could invoke this exception to justify its regulation that aimed at the protection of the sea turtles.²⁸⁴ The Appellate body also took account of Art. 56 of the UNCLOS in support of the proposition that natural resources could include both living and non-living sources.²⁸⁵ Furthermore, in the *US - Shrimp* case the Appellate Body also referred to general principles of international law in the meaning of the Art. 31(3)(c), namely the principle of good faith and the related doctrine of *abus de droit*.²⁸⁶

In the *Chile - Price Band System* case the Panel interpreted and applied the agreement between Chile and Mercosur in a way that excluded its consideration in the present case.²⁸⁷

²⁸¹ Appellate Body Report. *United States - Standards for Reformulated and Conventional Gasoline*. 1996. WT/DS2/AB/R, p. 17.

²⁸² Report of the Study Group of the International Law Commission, para. 443; Appellate Body Report. *United States - Import Prohibition of Certain Shrimp and Shrimp Products*. 1998. WT/DS58/AB/R, paras 126-134.

²⁸³ van den Bossche and Prévost, p. 9.

²⁸⁴ Appellate Body Report. *United States - Import Prohibition of Certain Shrimp and Shrimp Products*. 1998. WT/DS58/AB/R, para. 134; Report of the Study Group of the International Law Commission, para. 443; van den Bossche and Prévost, p. 10.

²⁸⁵ Appellate Body Report. *United States - Import Prohibition of Certain Shrimp and Shrimp Products*. 1998. WT/DS58/AB/R, para. 130; Report of the Study Group of the International Law Commission, para. 443.

²⁸⁶ Appellate Body Report. *United States - Import Prohibition of Certain Shrimp and Shrimp Products*. 1998. WT/DS58/AB/R, para. 158.

²⁸⁷ Report of the Study Group of the International Law Commission, para. 446.

The Panel applied a non-WTO treaty in order to operate a *renvoi* - by interpreting it so as to allow a treatment in a WTO context that would not have been allowed under it (thus creating the presumption that had the agreement not been interpreted in such a way, then the WTO standard would have been inapplicable).²⁸⁸

In the *US - FSC* case the Appellate Body found that there is no universally agreed meaning for the term “foreign-source income” in international tax law.²⁸⁹ While interpreting this term the Appellate Body referred to the SCM Agreement which was not relevant in the current case and found that foreign-source income refers to income generated by activities of a non-resident taxpayer in a foreign state which have such links with that state so that the income could properly be subject to tax in that state.²⁹⁰

In *EC - Sardines* and in *EC and Certain Member States - Large Civil Aircraft* the WTO Appellate Body considered the principle of non-retroactivity reflected in the Art. 28 of the VCLT a general principle of law.²⁹¹ It found that this principle is relevant to the interpretation of the WTO covered agreements.²⁹²

On the other hand, there is also practice of the WTO dispute settlement that is conflicting with the Art. 31(3)(c) of the VCLT. It cannot be excluded that sometimes there exists a conflict between the WTO law and other international law that cannot be resolved through interpretation.²⁹³ In such cases, the question arises whether provisions of international agreements on the environment, human rights or minimum labour standards can be relied upon in trade disputes as justifications for violations of the WTO obligations.²⁹⁴ There are cases where the WTO Appellate Body and the panels have refused to accept rules that derive from other regimes of international law.

In the *EC - Hormones* case the WTO Appellate Body considered the status of precautionary principle. It stated that the status of the precautionary principle is subject to debate and by

²⁸⁸ Report of the Study Group of the International Law Commission, para. 446. See also Panel Report. *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*. 2002. WT/DS207/R, paras VII.481 - VII.486.

²⁸⁹ Appellate Body Report. *United States - Tax Treatment for “Foreign Sales Corporations” - Recourse to Article 21.5 of the DSU by the European Communities*. 2002. WT/DS108/AB/RW, para. 141.

²⁹⁰ *Ibid.*, paras 142-145.

²⁹¹ Appellate Body Report. *European Communities - Trade Description of Sardines*. 2002. WT/DS231/AB/R, para. 200; Appellate Body Report. *European Communities and Certain Member States - Measures affecting Trade in Large Civil Aircraft*. 2011. WT/DS316/AB/R, para. 672.

²⁹² *Ibid.*

²⁹³ van den Bossche and Prévost, p. 9.

²⁹⁴ *Ibid.*

some scholars it is regarded as having crystallized into a general principle of customary international environmental law.²⁹⁵ The Appellate Body concluded that whatever the status of that principle is under international environmental law, it had not become binding for the WTO.²⁹⁶

This approach taken by the WTO Appellate Body in the case *EC - Hormones* suggests that environmental law and trade law might be governed by different principles.²⁹⁷ Which rule to apply would then depend on how a case would be qualified in this regard.²⁹⁸ This might seem problematic as denominations such as trade law or environmental law do not have clear boundaries.²⁹⁹ For example, maritime transport of oil links to both trade and environment, as well as to the rules on the law of the sea.³⁰⁰ Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity?³⁰¹ The responses are bound to vary depending on which one chooses as the relevant frame of legal interpretation.³⁰²

In the *Mexico - Taxes on Soft Drinks* case the Appellate Body found that there is no basis in the DSU for panels and the Appellate body to adjudicate non-WTO disputes:³⁰³ “Mexico's interpretation would imply that, in order to resolve the case, WTO panels and the Appellate Body would have to assume that there is a violation of the relevant international agreement (such as the NAFTA) by the complaining party, or they would have to assess whether the relevant international agreement has been violated. WTO panels and the Appellate Body would thus become adjudicators of non-WTO disputes. As we noted earlier, this is not the function of panels and the Appellate Body as intended by the DSU.”³⁰⁴ In the same case of *Mexico - Taxes on Soft Drinks*, the Appellate Body also refused to decide whether the “clean

²⁹⁵ Appellate Body Report. *European Communities - EC Measures Concerning Meat and Meat Products (Hormones)*. 1998. WT/DS26,48/AB/R, para. 123.

²⁹⁶ *Ibid.*, paras 124-125; Koebele, M. *EC - Hormones Case*. 2007. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1690?rskey=UJzoRi&result=1&prd=EPIL> (15.04.2017), para. 9.

²⁹⁷ Report of the Study Group of the International Law Commission, para. 55.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ van den Bossche and Prévost, p. 10; Lang, A. Twenty Years of the WTO Appellate Body's “Fragmentation jurisprudence”. - *Journal of International Trade Law and Policy*. 2015/14. Issue 3, p. 117.

³⁰⁴ Appellate Body Report. *Mexico - Tax Measures on Soft Drinks and Other Beverages*. 2006. WT/DS308/AB/R.

hands” doctrine relied on by Mexico was indeed part of the WTO law.³⁰⁵ This approach - refusing to decide one way or another - was also used in the case *EC - Sugar* regarding the principle of estoppel.³⁰⁶

In the case *EC - Approval and Marketing of Biotech Products* a question came up about the Art. 31(3)(c) of the VCLT. One of the issues was whether the Panel could take account of other rules of international law and non-WTO law such as the Convention on Biological Diversity.³⁰⁷ There is an agreement that a non-WTO rule that is binding upon all WTO members, such as international custom or a general principle of law, can be considered when interpreting WTO agreements.³⁰⁸ What is unclear is to what extent a non-WTO rule that only binds a subset of the WTO membership or not even all the parties to a dispute can be taken into consideration.³⁰⁹

The Panel found that the Art. 31(3)(c) of the VCLT was relevant in the current case.³¹⁰ The Panel agreed that this provision includes all sources of international law as set out in the Art. 38 of the ICJ Statute.³¹¹ The problem arose when the Panel was analyzing the meaning of the term “parties” within the meaning of the Art. 31(3)(c) of the VCLT. The Panel limited the scope of application of the Art. 31(3)(c) to rules applicable in the relations between the parties to the treaty, here the WTO Agreement.³¹² It dismissed the view that the reference to “parties” in the Art. 31(3)(c) would have meant merely parties to the dispute.³¹³

Therefore, the Panel found that only these rules of international law have to be taken into account that are binding to all members of the WTO.³¹⁴ The Panel based its finding on the Art. 2(1)(g) of the VCLT which defines a party meaning “a state which has consented to be bound by the treaty and for which the treaty is in force”.³¹⁵ As a result, the Panel did not feel

³⁰⁵ Lang, p. 118.

³⁰⁶ *Ibid.* Appellate Body Report. *European Communities - Export Subsidies on Sugar*. 2005. WT/DS265-266,283/AB/R, para. 310, 312.

³⁰⁷ Riffel, C. *Biotech Case*. 2016. - Max Planck Encyclopedia of Public International Law. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2178?rskey=mYdhum&result=1&prd=EPIL> (15.04.2017), para. 2.

³⁰⁸ Riffel, para. 2.

³⁰⁹ *Ibid.*

³¹⁰ Panel Report. *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*. 2006. WT/DS291-293/R, para. 7.69.

³¹¹ *Ibid.*, para. 7.67.

³¹² Riffel, para. 5; Lang, p. 119.

³¹³ Report of the Study Group of the International Law Commission, para. 448; Lang, p. 119.

³¹⁴ Panel Report. *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*. 2006. WT/DS291-293/R, para. 7.68.

³¹⁵ Riffel, para. 5.

obliged to consider the Convention on Biological Diversity or the Biosafety Protocol, because the USA, one of the disputants, was not bound by them.³¹⁶

Furthermore, in the *EC - Approval and Marketing of Biotech Products* case the WTO Panel was prepared to take into account the precautionary principle of international environmental law, if it were established that it had achieved the status of a general principle of law.³¹⁷ The Panel also considered the argument by the EC that the precautionary principle might, since 1998 when the argument had been made in the *EC - Hormones* case, have been established as a general principle of international law.³¹⁸ The Panel approved that would this be the case, it would then become relevant under the Art. 31(3)(c).³¹⁹ However, it found that the legal status of the precautionary principle remains unsettled and it need not take a position on whether or not the precautionary principle is recognised principle of general or customary international law.³²⁰

There are two important aspects of the case *EC - Approval and Marketing of Biotech Products*. First, the Panel accepted that the Art. 31(3)(c) applied to general international law and other treaties.³²¹ Second, it interpreted the Art. 31(3)(c) so that the treaty to be taken into account of must be one which all parties to the relevant WTO treaty are also parties to.³²² This second contention has been criticised a lot, because it makes it practically impossible ever to find a multilateral context where reference to other multilateral treaties as aids to interpretation under the Art. 31(3)(c) of the VCLT would be allowed.³²³

In the more recent case of *EC and certain member States - Large Civil Aircraft*, the Appellate Body was departing from the Biotech panel's approach in the certain circumstances.³²⁴ Still, its decision in this respect was cryptic and cautious.³²⁵ The Appellate Body noted: "In a

³¹⁶ Report of the Study Group of the International Law Commission, para. 448; Riffel, para. 5.

³¹⁷ Dörr and Schmalenbach, Art. 31, para. 98; Panel Report. *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*. 2006. WT/DS291-293/R, para. 7.76.

³¹⁸ Report of the Study Group of the International Law Commission, para. 449. See also: Panel Report. *European Communities - EC Measures Concerning Meat and Meat Products (Hormones)*. 1997. WT/DS26/R/USA, para. 7.68.

³¹⁹ Dörr and Schmalenbach, Art. 31, para. 98; Panel Report. *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*. 2006. WT/DS291-293/R, para. 7.76; Report of the Study Group of the International Law Commission, para. 449.

³²⁰ Panel Report. *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*. 2006. WT/DS291-293/R, para. 7.89.

³²¹ Report of the Study Group of the International Law Commission, para. 450.

³²² *Ibid.*

³²³ *Ibid.*; see also Lang, p. 119.

³²⁴ Lang, p. 119.

³²⁵ *Ibid.*

multilateral context such as the WTO, when recourse is had to a non-WTO rule for the purposes of interpreting provisions of the WTO agreements, a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members.”³²⁶ This is clearly an important statement, but the decision is noteworthy for its extreme caution and its decided unwillingness to set out this approach in bold statements.³²⁷

Furthermore, in that same case of *EC and certain member States - Large Civil Aircraft* the Appellate Body decided that, regardless of the way one interprets “the parties” in the Art. 31(3)(c), it did not need to refer to the agreement in question, because the EC had not shown precisely how it was “relevant” to the specific legal question at issue.³²⁸ This is another noteworthy feature of the WTO jurisprudence on the Art. 31(3)(c): while some others have tended to downplay the legal significance of the term “relevant” in Art. 31(3)(c), the Appellate Body has treated it as a substantive requirement, requiring considerable effort to prove.³²⁹

In conclusion, the treaty interpretation in the practice of the WTO dispute settlement is not unified also in the question whether other rules of international law are considered while interpreting a treaty. On the one hand, there are cases where the panels and the Appellate Body have acted in accordance with the Art. 31(3)(c) of the VCLT. On the other hand, there are cases where they have clearly made decisions that are conflicting with the Art. 31(3)(c) of the VCLT. In the next section it will be discussed whether this is in accordance with the VCLT and, if not, whether there can be a reasonable justification.

2.2.3. Conclusions on the practice of the Art. 31(3)(c) of the VCLT in the WTO dispute settlement

Based on the previous section (section 2.2.2.), it can be concluded that the practice of the Art. 31(3)(c) of the VCLT is not unified. More precisely, in the practice of the WTO dispute settlement there are both - cases where the Art. 31(3)(c) is followed and cases where it is not

³²⁶ Appellate Body Report. *European Communities and Certain Member States - Measures Affecting Trade in Large Civil Aircraft*. 2011. WT/DS316/AB/R, para. 845.

³²⁷ Lang, p. 119.

³²⁸ *Ibid*, p. 119-120.

³²⁹ *Ibid*, p. 120.

done by the panels nor the Appellate Body. Related to these cases where the Art. 31(3)(c) of the VCLT is not followed, we can talk about fragmentation of international law.

There is an academic debate over the role of non-WTO law in the WTO adjudication. From one perspective, there are scholars who strongly argue that non-WTO law should be applicable and sometimes even prevail over the WTO rules.³³⁰

In their treaty relations states can contract out of one, more or even all rules of international law (other than *jus cogens* rules), but they cannot contract out of the system of international law.³³¹ The prohibition on setting up a treaty regime outside international law can be compared to the prohibition on a limited number of individuals under domestic law setting up their own state within another state.³³² This unitary view of international law prohibiting the creation of sub-systems completely delinked from general international law rules is crucial to avoiding the situation where a particular regime of international law becomes a safe haven (either for states to escape obligations or for domestic pressure groups to circumvent domestic legal constraints by insulating their particular interests in a cocoon, impermeable to limitations or restrictions that they may face even under domestic law).³³³

The Art. 1(1) of the DSU states that the WTO dispute settlement system settles the disputes between members concerning their rights and obligations under the provisions of the WTO Agreement and of the DSU taken in isolation or in combination with any other covered agreement. It does not exclude reference to other international law rules when interpreting the WTO provisions.³³⁴ Furthermore, there are other treaty provisions which confirm that the WTO should be seen as part of international law. Art. 3(2) of the DSU states clearly that rules of interpretation play role in the WTO dispute settlement.³³⁵ TRIPS Agreement incorporates several obligations from existing intellectual property law conventions, with Art. 9(1) requiring members to comply with certain provisions of the Berne Convention for the

³³⁰ Delimatsis, p. 14. See also: Pauwelyn, J. *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*. Cambridge: Cambridge University Press 2003; Broude, pp 267-268; Mitchell, p. 66.

³³¹ Pauwelyn 2003, p. 37.

³³² *Ibid.*

³³³ Pauwelyn 2003, p. 38.

³³⁴ Bartels, L. *Applicable Law Before International Courts and Tribunals*. Oxford: Oxford University Press 2010; Delimatsis, p. 14; Pauwelyn 2003, p. 560.

³³⁵ See also the corresponding Art. 17(6)(ii) of the Anti-Dumping Agreement. See also: Mavroidis, P., Palmetier, D. *Dispute Settlement in the World Trade Organization: Practice and Procedure*. 2nd ed. 2004, pp 69-73; Mitchell, p. 66.

Protection of Literary and Artistic Works.³³⁶ Last but not least, in the practice of the WTO dispute settlement the Appellate Body and the panels have frequently referred to rules and principles of general international law.³³⁷

From another perspective, several scholars have suggested that the WTO adjudicating bodies are to apply as substantive law only the WTO law.³³⁸ The Art. 7 of the DSU equally suggests as much by essentially specifying the applicable law, that is, the covered agreements.³³⁹ However, non-WTO law can still be regarded as a factual matter in order to interpret the applicable WTO provisions, for instance, under the Art. 31(3)(c) of the VCLT.³⁴⁰

It has also been argued that the WTO system should be considered a self-contained regime.³⁴¹ A self-contained regime is a regime which comprises not only rules that regulate a particular field or factual relations laying down the rights and duties of the actors within the regime (primary rules), but also a set of rules that provide for means and mechanisms to enforce compliance, to settle disputes, to modify or amend the undertakings and to react to breaches (secondary rules), with the intention to replace and through this to exclude the application of general international law, at least to a certain extent.³⁴² Therefore, this argument would justify the way how treaties are being interpreted in the WTO dispute settlement.

D. McRae has come up with three main arguments to support this view. Firstly, trade law is seen too technical and it has also been held by the trade lawyers that their field is special.³⁴³ Trade relations are in many countries overseen by the economic, trade or commerce ministry which is detached from that of foreign affairs which is dealing with public international

³³⁶ Mitchell, p. 66.

³³⁷ See for example: Panel Report. *Korea – Measures Affecting Government Procurement*. 2000. WT/DS163/R, para. 7.101, fn. 755; Panel Report. *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*. 2006. WT/DS291-293/R, para. 7.68; Panel Report. *China - Measures Affecting Electronic Payment Services*. 2012. WT/DS413/R, para. VII.74.

³³⁸ Delimatsis, p. 14.

³³⁹ *Ibid.*

³⁴⁰ *Ibid*; Marceau, G. A Call for Coherence in International Law - Praises for the Prohibition Against “Clinical Isolation” in WTO Dispute Settlement. - *Journal of World Trade*. 1999/33. Issue 5, p. 131; Marceau, G. Fragmentation in International Law: The Relationship Between WTO Law and General International Law. - *Finnish Yearbook of International Law*. 2006/17, p. 31; Mavroidis, P. No Outsourcing of Law? WTO Law as Practiced by WTO Courts. - *American Journal of International Law*. 2008/102, p. 421; Trachtman, J. P. The World Trading System, the International Legal System and Multilevel Choice. - *European Law Journal*. 2006/12. Issue 4, p. 483.

³⁴¹ See for example: Klein, E. Self-Contained Regime. 2006 - *Max Planck Encyclopedia of Public International Law*. Available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1467?rskey=4QMvm7&result=1&prd=EPIL> (15.04.2017), para. 13; Sacerdoti 2008, p. 597; McRae 2006, p. 369.

³⁴² Klein, para. 13.

³⁴³ Cassese, A. *International Law in a Divided World*. Oxford: Clarendon 1986, p. 317; Pauwelyn 2003, p. 30; McRae 1996, p. 115.

law.³⁴⁴ Secondly, trade can also be seen as mostly a matter for the private sphere, not a matter for governments.³⁴⁵ Thirdly, and most importantly in D. McRae's view, there is a problem of fitting international trade and economic law in general into a discipline that defined itself in terms of peace and security, in terms of the territorial integrity and political independence of states, in terms of sovereignty.³⁴⁶

However, there are also scholars who do not agree with the previous view and believe that the WTO system should not be considered a self-contained regime.³⁴⁷ I also support this opinion and there are different arguments to explain it.

Firstly, the conclusion of the WTO Agreement as a formal treaty and the creation of the WTO as an international organisation are developments that had the effect of subjecting the WTO fully to international law.³⁴⁸ Each treaty that creates a new regime is first of all part of general international law as it is created within and according to it.³⁴⁹ Furthermore, the previous WTO Director-General P. Lamy has explained that the reliance of the WTO Appellate Body and panels on rules of the VCLT is a clear confirmation that the WTO wants to see itself as being as fully integrated into the international legal order as possible.³⁵⁰ Therefore, the WTO Appellate Body and panels have also adopted the approach that the WTO system is not a self-contained regime. Also, as referred earlier, the Appellate Body has itself stated that the agreements should not be read "in a clinical isolation from public international law".³⁵¹ The Appellate Body meant that public international law enters into the WTO system through the channel of treaty interpretation as the relevant normative context.³⁵²

Secondly, J. Pauwelyn has criticised that this international law that D. McRae refers to (in his third argument) is the international law of co-existence prevalent up to the end of the First

³⁴⁴ Pauwelyn 2003, p. 30; McRae 1996, p. 115.

³⁴⁵ McRae 1996, p. 115; Pauwelyn 2003, p. 30.

³⁴⁶ McRae 1996, p. 116.

³⁴⁷ See for example: Gruszczynski, p. 52; Koskenniemi, M., Leino, P. Fragmentation of International Law? Postmodern Anxieties. - *Leiden Journal of International Law*. 2002/15, p. 571; Pauwelyn, J. The Role of Public International Law in the WTO: How Far Can We Go? - *American Journal of International Law*. 2001/95; Deane, F. Emissions Trading and WTO Law: A Global Analysis. Cheltenham: Edward Elgar Publishing 2015, p. 49; Pauwelyn 2003, pp 29-33.

³⁴⁸ Marceau, G. Conflicts of Norms and Conflicts of Jurisdiction: The Relationship between the WTO Agreement and MEAs and Other Treaties. - *Journal of World Trade*. 2001/35, p. 1081; Mitchell, p. 65.

³⁴⁹ Klein, para. 13; Pauwelyn 2001, p. 537.

³⁵⁰ Lamy, P. The Place of the WTO and its Law in the International Legal Order. - *The European Journal of International Law*. 2007/17. No. 5, p. 979.

³⁵¹ Appellate Body Report. *United States - Standards for Reformulated and Conventional Gasoline*. 1996. WT/DS2/AB/R, p. 16; Delimatsis, p. 11.

³⁵² Koskenniemi and Leino, p. 571; Ruiz-Fabri, H. La prise en compte du principe de précaution par l'OMC. - *Revue Juridique de l'Environnement*. 2000/25. Numéro 1, p. 57.

World War.³⁵³ Since then international law has expanded its scope so as to include also law on co-operation.³⁵⁴ Together with disciplines such as international human rights law and environmental law, international trade law is a testimony to this expansion into new fields where states realised the need to co-operate in order to tackle common problems.³⁵⁵

Nevertheless, even if we do not see the WTO system as a self-contained regime, there can still be found reasonable explanations why the reports by the panels and the Appellate Body are sometimes conflicting with the Art. 31(3)(c) of the VCLT. Of course, it is easier to find the downside of the reports and criticise the WTO for that. Nevertheless, there are arguments that help to understand and to reason the approach taken by the WTO. In this sense I agree with A. Lang who argues that the response of the WTO Appellate Body and panels to cases involving fragmentation is more often driven by caution rather than the myopia of which it is often accused.³⁵⁶

The Appellate Body's and panels general reluctance to make formal and explicit reference to non-WTO law is not quite the same as normative closure.³⁵⁷ It is probably fair to say that the Appellate Body and panels do take a great deal international law into account which does not formally enter the pages of its reports.³⁵⁸ Furthermore, the Appellate Body is intensely aware of the reality of the fragmentation of international law, and very conscious of the high stakes of their decisions for other areas of international law, that it has as a consequence adopted a self-consciously cautious and non-confrontational style of decision-making.³⁵⁹ After all, in cases which raise potential normative conflicts between the WTO and non-WTO law, the Appellate Body and the panels find themselves in a difficult position, being asked to adjudicate cases involving fundamental values conflicts which are hardly amendable to judicial resolution, at least not without threatening the legitimacy of the tribunals to whom the task falls.³⁶⁰ The Appellate Body and the panels are, thus, actively seeking to avoid addressing the problem of normative conflicts, refusing to hierarchise different regimes of international law, rejecting anything which looks like an attempt to systematise or

³⁵³ Pauwelyn 2003, p. 31.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ Lang, p. 123.

³⁵⁷ *Ibid.*, p. 121.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*

constitutionalise international law, and leaving controversial questions as open as possible, for as long as reasonable.³⁶¹

It is especially understandable, because the members of the WTO Appellate Body and panels are - first of all - trade experts. The Art. 17(3) of the DSU requires that the Appellate Body shall be comprised of persons of recognised authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. The Art. 8(1) of the DSU requires that panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a member. Thus, it might be too much to expect from them an extensive knowledge of all specific regimes of international law, like environmental law, human rights law etc. Also, they are not this kind of academic scholars - as the ones criticising their reports for being controversial to the VCLT - who only see the theoretical side of the problem. I rather think they solve the issues from a practical perspective, questioning which solution is better for the parties to the dispute. After all, according to the Art. 7(3) of the DSU the aim of the WTO dispute settlement is to secure a positive solution to a dispute.

In conclusion, I support the view that the WTO dispute settlement system is part of international law and, thus, the rules of general international law and other regimes of international law should also have an impact while settling a dispute in the WTO. Nevertheless, this does not mean that the reports made by the panels and the Appellate Body should be directly disapproved. As explained earlier, there can be reasonable justifications for these reports and, furthermore, it is rather important to analyse which real effect this causes to international law and community in general. This question will be addressed in the next chapter.

³⁶¹ Lang, p. 121.

3. The effect of the fragmented practice of treaty interpretation in the WTO dispute settlement to international law and community in general

As explained in the previous chapter, the practice of treaty interpretation in the WTO dispute settlement is fragmented. The current chapter will give an overview of the effect of the fragmented practice of treaty interpretation in the WTO dispute settlement to the international community and international law in general. It gathers opinions reflected about fragmentation of international law in legal bibliography by different scholars and analyses whether the same problems are relevant related to treaty interpretation in the WTO dispute settlement. Furthermore, it analyses whether these are just theoretical problems reflected in academic articles or do these exist also in the reality.

The reactions to the phenomenon of fragmentation of international law have varied and changed over time - originally they were rather hostile and negative, but recently fragmentation is seen in a more positive light.³⁶² The current chapter analyses both positive and negative effects of the fragmentation and does not aim to give an opinion whether it is only positive or only negative.

Firstly, it will be discussed how the fragmented practice of treaty interpretation in the WTO dispute settlement decreases the credibility and reliability of the WTO (section 3.1.) and, secondly, how it decreases the authority of the WTO (section 3.2.). Thirdly, it will be analysed whether the fragmentation might trigger forum shopping (section 3.3.) and, last but not least, how the fragmentation might strengthen international law in general (section 3.4.).

3.1. Decreasing the credibility and reliability of the WTO

In his speech to the General Assembly in 2000, the former president of the ICJ G. Guillaume addressed his concerns for the consequences of the proliferation of international courts and tribunals: “The proliferation of international courts gives rise to serious risks of conflicting jurisprudence, as the same rule of law might be given different interpretations in different

³⁶² Pauwelyn 2006, para. 13.

cases. This is a particularly acute risk, as we are dealing with specialized courts that are inclined to favour their own discipline.”³⁶³

On the one hand, it has been found by several other scholars that because of the fragmentation of international law the legal subjects are no longer able to predict the reaction of official institutions to their behaviour and, therefore, they are also not able to plan their activity accordingly.³⁶⁴ The reason for that is the possibility of conflicting judgments from different international courts and tribunals.³⁶⁵ A settlement reached by one organ will only resolve a dispute within that system and not necessarily for the purpose of another or the universal system.³⁶⁶ Divergent solutions and conflicting judgments can undermine the credibility and reliability of international institutions and international law in general.³⁶⁷

The importance of international trade law was discussed previously in the section 1.2.1. and it was stated that international trade rules are necessary, because the traders and investors need a degree of security and predictability. The predictability and security resulting from international trade rules will encourage investments and trade and will thus contribute to global economic welfare. Unfortunately, the practice of the WTO dispute settlement is controversial and is in conflict with general rules of international law and other regimes of international law. In the section 2.2.3. it was concluded that the WTO Appellate Body and panels tend to consider the sources of general international law and the sources of other regimes of international law irrelevant while interpreting a treaty. Thus, it can be argued that in the WTO dispute settlement the disputes are also very often resolved only within the WTO system which makes the solutions different than these could be in other dispute settlement systems. This can be disappointing to parties to the dispute.

On the other hand, it can also be argued that in a situation where the WTO Appellate Body and panels would start applying all treaties of environmental law, human rights law and other special regimes, the outcome of the dispute would get even more unclear than it is now. The WTO dispute settlement system is specialised on applying the WTO law mostly and, thus, the

³⁶³ Address by H. E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly. 2000. Available at: <http://www.icj-cij.org/court/index.php?pr=%2084&pt=3&p1=1&p2=3&p3=1> (15.04.2017); Treves, p. 219.

³⁶⁴ Report of the Study Group of the International Law Commission, para. 52.

³⁶⁵ Burke-White, W. W. International Legal Pluralism. - Michigan Journal of International Law. 2004/25. Issue 4, p. 967.

³⁶⁶ Hafner, p. 858.

³⁶⁷ *Ibid.*

subject can also rather predict how the WTO Appellate Body and panels apply these specific treaties.

It is also important to bear in mind that in contrast to the position in common law countries, there is no doctrine of binding precedent in international law.³⁶⁸ The Art. 38(1) of the Statute of the ICJ names the sources of international law and it refers to judicial decisions as a subsidiary means for the determination of rules of law.³⁶⁹ The Statute also expressly provides that a decision of the ICJ is not binding on anyone except the parties to the case in which that decision is given and even then only in respect of that particular case.³⁷⁰ Thus, there is no reason to believe that the legal subjects should always have the idea what is the outcome of their dispute.

Moreover, it has been argued that the debate on fragmentation has made international judges even more aware of the responsibility they bear for a coherent construction of international law.³⁷¹ As explained in the section 2.2.3., the Appellate Body and panels also seem to be aware of the reality of the fragmentation of international law and have rather adopted a cautious decision-making style.³⁷² However, the international judiciary has developed a set of tools to cope with the undesirable aspects of both fragmentation and proliferation, and appears to employ it in full awareness of these challenges on a regular basis.³⁷³ The so-called toolbox of international law is not perfect, but is flexible enough to assist negotiators, lawyers and judges in finding the right balance between different specialised regimes of international law.³⁷⁴ This toolbox is the normative basis provided by the rules of general international law and the VCLT.³⁷⁵ Thus, it is extremely important that at least the rules of general international law and the VCLT are used and interpreted in the same way in different courts and tribunals.

Nevertheless, the WTO Appellate Body and panels have rather failed in this task, as their practice related to treaty interpretation according to the Art. 31 of the VCLT is not unified. The only things that the WTO Appellate Body and panels have done against fragmentation of

³⁶⁸ Greenwood, C. Sources of International Law: An Introduction. 2008. - Available at: http://legal.un.org/avl/pdf/ls/greenwood_outline.pdf (15.04.2017); Guillaume, G. The Use of Precedent by International Judges and Arbitrators. - Journal of International Dispute Settlement. 2011/2. No. 1, p. 9; Commission, J. P. Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence. - Journal of International Arbitration. 2007/24. No. 2, p. 134.

³⁶⁹ Greenwood, p. 4.

³⁷⁰ Art. 59 of the Statute of the ICJ.

³⁷¹ Simma, p. 265.

³⁷² Lang, p. 121.

³⁷³ Simma, p. 297.

³⁷⁴ Pauwelyn 2006, para. 42.

³⁷⁵ *Ibid*; Report of the Study Group of the International Law Commission, para. 493.

international law, are the frequent references to the decisions by the ICJ and other international courts, mostly with respect to treaty interpretation.³⁷⁶ But this does not mean that they follow the treaty interpretation rules in every decision they make.

It has also been argued that the risk of conflicting judgments is largely a theoretical problem, because the fundamentals of general international law tend to remain the same regardless of which tribunal is deciding the issue.³⁷⁷ It might be true in some regimes, but the 2nd chapter of the current thesis clearly explained how the practice of the WTO dispute settlement is fragmented concerning the treaty interpretation rules. Treaty interpretation is an important part of general international law that should remain the same in every dispute settled in different regimes.

Also, the scholars who tend to express their concern about the dangers of incoherent case law base their analysis on only one or several international law cases which have become famous for this reason.³⁷⁸ Usually this case is the divergence in approaches between the ICJ in the *Nicaragua* case and the ICTY in the second appeal decision by the Appeals Chamber in the *Tadic* case in respect of the conditions under which the actions of an armed non-state actor can be attributed to the state.³⁷⁹

Another example brought out by many scholars is the *MOX Plant* case.³⁸⁰ The question raised in the *MOX Plant* case was whether the conflict is about the law of the sea, about pollution of the North Sea or and issue related to inter-European Community relationships.³⁸¹ The ITLOS even held that the application of the same rules by different institutions might be different owing to the differences in the respective context, object and purposed, subsequent practice of

³⁷⁶ Simma, p. 283. See also: Appellate Body Report. *US Standards for Reformulated Gasoline*. 1999. WT/DS2/AB/R, p. 17; Appellate Body Report. *Japan – Taxes on Alcoholic Beverages*. 1996. WT/DS8,10-11/AB/R, p. 12; Appellate Body Report. *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*. 1999. WT/DS98/AB/R, para 81.

³⁷⁷ Fauchald and Nollkaemper. Introduction. 2014, p. 6.

³⁷⁸ Dupuy, P.-M. The Unity of Application of International Law at the Global Level and the Responsibility of Judges. - European Journal of Legal Studies. 2007/1. No. 2, p. 36.

³⁷⁹ Ahmad, S., Choudhry, I. A. Alleged Fragmentation of International Law: Magnitude of the Problem and Available Solutions. - Journal of Political Studies. 2015/22. Issue 2, p. 689; Dupuy 2007, p. 36; See also: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) I.C.J. Reports 1986 pp 64-65; Prosecutor v. Dusko Tadic, Judgment of 15 July 1999, Case No. IT-94-1-A, A.Ch.

³⁸⁰ See for example: Ahmad and Choudhry, p. 683-685; Deplano, R. Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry. - European Journal of Legal Studies. 2013/6. Issue. 1, p. 69; Koskeniemi, M. Constitutionalism, Managerialism and the Ethos of Legal Education. - European Journal of Legal Studies. 2007/1. Issue 1; Report of the Study Group of the International Law Commission, paras 10, 439-442.

³⁸¹ Ahmad and Choudhry, p. 684.

parties and *travaux préparatoires*.³⁸² There are more cases, where the question of conflicting judgments has arisen, but these are still rather exceptional.

In the view of the current thesis it is important that these cases are not related to trade law and have not been settled in front of the WTO Appellate Body or panels. Therefore, it is possible to conclude that at least in trade law and WTO law the problem of conflicting judgments is merely a theoretical and does not exist in practice. Furthermore, it is rather difficult to state that the conflicting judgments of the *Nicaragua* case and *Tadic* case have somehow decreased the credibility and reliability of the ICJ and the ICTY.

In conclusion, I agree that the fragmented practice of international law can, to some extent, decrease the credibility and reliability of international institutions and international law. This seems to be especially a possible problem with the WTO dispute settlement system, because the questions where they have gone into conflict with general international law and other regimes of international law are one of the most important ones - the treaty interpretation rules laid down in the Art. 31 of the VCLT. On the other hand, it does not seem to be a problem in reality. So far there are no trade law cases which have been solved in contrary fashion by different international courts or tribunals. Moreover, if the WTO Appellate Body and panels would start applying all specialized treaties, probably the outcome of the dispute would get even more unclear.

3.2. Decreasing the authority of the WTO

In the previous section it was analysed how the fragmentation of international law can affect the credibility and reliability of the WTO in a sense that the subjects of international law cannot be sure what is the outcome of their dispute. Another question is how this affects the authority of the WTO in general.³⁸³ In the chapter 2 it has been explained that the practice of treaty interpretation is fragmented in the WTO dispute settlement. Furthermore, this situation has been discussed and criticised by many scholars (see the sections 2.1.3. and 2.2.3.). But is it a real problem affecting the reputation of the WTO or is it rather a theoretical problem represented only in legal research?

³⁸² *The MOX Plant case (Ireland v. United Kingdom)*. Request for provisional measures order. 3 December 2001, para. 51.

³⁸³ Ahmad and Choudhry, p. 682; Pauwelyn 2006, para. 14.

One of the most painful events in the history of the WTO is probably the protests held in Seattle during the ministerial conference of the WTO in November 1999. The protesters focused on issues including workers' rights, sustainable economies and environmental and social issues.³⁸⁴ Later these protests came to seem as not only silly, but also misguided.³⁸⁵ Most people were pro-democracy activists protesting at the dangerous unfairness at the current model of free trade, while agreed that international trade is beneficial to everyone.³⁸⁶ Instead, the media preferred to distort the protestors' concerns saying that they were all anti-trade and against the WTO.³⁸⁷ In conclusion, it was more an anti-globalisation movement than an anti-trade movement.³⁸⁸ Even if it caused some damage to the reputation of the WTO, it was just superficial.

In the view of the current thesis, the concept how the protests were carried out is actually very controversial. Some of the protesters were wearing sea turtle costumes to show that they are against the Appellate Body's decision in the *US - Shrimp* case, which concerned also sea turtles.³⁸⁹ In the view of the current thesis, the *US - Shrimp* case is one of the few cases being praised for the way how the Appellate Body referred to international environmental law and general international law while interpreting a treaty. Even if the outcome was not acceptable for everyone, at least the way how the Appellate Body interpreted the treaty was in accordance with the VCLT.

However, in reality the WTO does not have a remarkably negative reputation. It is rather the other way around - the WTO dispute settlement system has been praised for its substantial and distinguished role in strengthening the effectiveness of the WTO law.³⁹⁰ The WTO

³⁸⁴ Manski, B. Seattle WTO Uprising Still a Force in World Events, 15 Years Later. - Berkley Journal of Sociology. 1 Dec 2014. Available at: <http://berkeleyjournal.org/2014/12/seattle-wto-uprising-still-a-force-in-world-events-15-years-later/> (15.04.2017); Smith, N. The Dark Side of Globalization: Why Seattle's 1999 Protesters Were Right. - The Atlantic. 6 Jan 2014. Available at: <https://www.theatlantic.com/business/archive/2014/01/the-dark-side-of-globalization-why-seattles-1999-protesters-were-right/282831/> (15.04.2017); World Trade Organization Protests in Seattle. - Seattle Municipality Archives. Available at: <https://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle> (15.04.2017).

³⁸⁵ Smith.

³⁸⁶ Shah, A. WTO Protests in Seattle, 1999. - Global Issues. 2001. Available at: <http://www.globalissues.org/article/46/wto-protests-in-seattle-1999> (15.04.2017).

³⁸⁷ Shah.

³⁸⁸ Dwyner, M. Where Did the Anti-Globalization Movement Go? - New Republic. 26 Oct 2013. Available at: <https://newrepublic.com/article/115360/wto-protests-why-have-they-gotten-smaller> (15.04.2017); Rosenberg, P. From the "Beattle in Seattle" to Donald Trump: Remember when the anti-globalists were left-wing radicals? - Salon. 11 Dec 2016. Available at: <http://www.salon.com/2016/12/11/from-the-battle-in-seattle-to-donald-trump-remember-when-the-anti-globalists-were-left-wing-radicals/> (15.04.2017)

³⁸⁹ Tate, C. WTO Chronicles: Nancy Pennington Talks About Turtles. - History Link. 12 June 2000. Available at: <http://www.historylink.org/File/2871> (15.04.2017)

³⁹⁰ van Damme 2009, p. 7.

dispute settlement system is often called the “Crown Jewel of the WTO”³⁹¹ and also the “World Trade Court”³⁹². It has been stated that the WTO dispute settlement system is very successful in resolving trade disputes.³⁹³ It has attracted enormous interest because of its binding, rule-oriented nature and its well-established appeals system, both a rarity at the international level.³⁹⁴ New members continue to seek accession to the organisation to gain nondiscriminatory access to new markets, to complement politically controversial but important domestic economic reforms and to benefit from the security of a rules-based trading system.³⁹⁵

One of the clear signs that the WTO has a good reputation is the amount of cases it solves every single year. The WTO is the only global intergovernmental organisation concerned with the rules of trade between nations: it is the leading forum for trade negotiations and for the resolution of trade disputes.³⁹⁶ Thus, it covers now over 98 percent of world trade.³⁹⁷ Moreover, the WTO has one of the most active international dispute settlement mechanisms in the world.³⁹⁸ The number of applications has increased considerably since the beginning of the WTO and has probably exceeded the expectations of the negotiators of the DSU.³⁹⁹ The current Director-General R. Azevêdo has stated that the fact that the WTO reached a significant milestone with the receipt of its 500th trade dispute for settlement in 2015 shows that the WTO dispute settlement system enjoys tremendous confidence among the members.⁴⁰⁰ 2015 was the busiest year on record for the WTO dispute settlement system, with an average of 30 active panels per month.⁴⁰¹ The Dispute Settlement Body adopted 11 panel reports, compared to 9 in 2014.⁴⁰²

³⁹¹ Broude, p. 17; Ehlermann, p. 639.

³⁹² Ehlermann, p. 605.

³⁹³ Davis, C. L. The Effectiveness of WTO Dispute Settlement: An Evaluation of Negotiation Versus Adjudication Strategies. 2008. Available at: https://www.princeton.edu/~cldavis/files/WTOeffectiveness_DavisAPSA08.pdf (15.04.2017); p. 36.

³⁹⁴ Mitchell, p. 52.

³⁹⁵ da Costa, P. N., Cimino-Isaacs, C. US Exit From WTO Would Unravel Global Trade. - Peterson Institute For International Economics. 26 July 2016. Available at: <https://piie.com/blogs/trade-investment-policy-watch/us-exit-wto-would-unravel-global-trade> (15.04.2017).

³⁹⁶ Mitchell 2008, p. 52.

³⁹⁷ da Costa and Cimino-Isaacs.

³⁹⁸ Dispute Settlement. The Website of the WTO. Available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb (15.04.2017).

³⁹⁹ Ehlermann, p. 609.

⁴⁰⁰ WTO Annual report 2016. Introduction. The Website of the WTO. Available at: https://www.wto.org/english/res_e/publications_e/anrep16_e.htm (15.04.2017), p. 6.

⁴⁰¹ *Ibid.*, p. 17.

⁴⁰² *Ibid.*

Secondly, the fact that the member states are content with the work of the WTO and its dispute settlement is another sign of a good reputation. Currently there are 164 members and 22 observers of the WTO.⁴⁰³ The observers have to start accession negotiations within five years of becoming observers.⁴⁰⁴ Thus, the WTO has the central position in international trade law, since it covers almost all of the trade in the world.

Recently the reputation of the WTO has been a hot topic in the news, because of the statements made by D. Trump, the president of the USA. During his election run he made clear that the WTO has lost its effectiveness and this may lead to the USA withdrawing from the WTO.⁴⁰⁵ It has also been stated that the D. Trump's administration of the USA is preparing to ignore any rulings by the WTO that it sees as an affront to USA sovereignty.⁴⁰⁶ It is clear that these kind of statements are made because of other, rather political reasons. This situation is not related to the treaty interpretation practice in the WTO dispute settlement. Furthermore, this opinion of D. Trump has been criticised a lot.⁴⁰⁷ It has been predicted that if the USA would really withdraw from the WTO, it would not bring dramatic consequences.⁴⁰⁸ Probably the leadership would just go over to China and the loss would be rather on the side of the USA.⁴⁰⁹

In conclusion, the concern about the authority of the WTO is understandable, because the WTO dispute settlement is not always following the rules of general international law, but the reality does not show any negative trend in the authority of the WTO dispute settlement. Furthermore, the WTO and especially its dispute settlement system is actually being praised since it is very fast and effective.

⁴⁰³ Members and Observers. The Website of the WTO. Available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (15.04.2017).

⁴⁰⁴ *Ibid.*

⁴⁰⁵ Brinkley, J. Trump May Withdraw U.S. From WTO, Outside Advisor Says. - Forbes. 13 Feb 2017. Available at: <https://www.forbes.com/sites/johnbrinkley/2017/02/13/trump-may-withdraw-u-s-from-wto-outside-advisor-says/#38a6d4ae33bb> (15.04.2017); Fox, M. US Could Walk Away from WTO If Necessary, Former Trump Trade Advisor Says. - CNBC. 10 Feb 2017. Available at: <http://www.cnbc.com/2017/02/10/us-could-walk-away-from-wto-if-necessary-former-trump-trade-advisor-says.html> (15.04.2017).

⁴⁰⁶ Beech, E. Trump Administration Would Ignore WTO Rulings It Sees as Anti-U.S.: FT. - Reuters. 1 March 2017. Available at: <http://www.reuters.com/article/us-usa-trump-wto-idUSKBN16832U> (15.04.2017); Worstall, T. Trump Admin's Yugely Terrible Trade Idea - To Ignore WTO Rulings America Doesn't Like. - Forbes. 1 March 2017. Available at: <https://www.forbes.com/sites/timworstall/2017/03/01/trump-admins-yugely-terrible-trade-idea-to-ignore-wto-rulings-america-doesnt-like/#4036df673a9f> (15.04.2017).

⁴⁰⁷ See for example: da Costa and Cimino-Isaacs.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ *Ibid.*

3.3. Triggering forum shopping

As explained earlier in the section 1.1.2., the amount of international courts and tribunals and enlarged international case law is also one of the reasons of the fragmentation of international law. The clearest effect of the proliferation of international courts and tribunals is that the multiple proceedings may result in divergent outcomes which may lead to the hassles of forum shopping.⁴¹⁰

The term “forum shopping” typically refers to the act of seeking the most advantageous venue in which to try a case.⁴¹¹ In international law it is a relatively new problem as previously there were not many courts or tribunals whose jurisdictions overlapped.⁴¹² The biggest concern with forum shopping among international tribunals seems to be the concern of inconsistent rulings, because they leave the dispute unsolved and can also threaten the stability and legitimacy of the broader system which the tribunals operate.⁴¹³

In practice it is common that the disputes related to trade law include also other special regimes of law and then raises the question where should these disputes be settled. A perfect example of this is the *Chile - Swordfish* case. This case highlights the complexity of the relationship between environmental and trade rules.⁴¹⁴

The EU brought the case before the WTO in April 2000 and a Panel was established by the WTO Dispute Settlement Body in December 2000.⁴¹⁵ Chile insisted that the issue is not of a commercial nature, but related to the need for conservation measures ensuring the sustainable fisheries for swordfish.⁴¹⁶ On this basis, Chile invited the EU to engage in formal dispute

⁴¹⁰ Ahmad and Choudhry, p. 682; Reinisch 2011, para. 15.

⁴¹¹ Algero, M. G. In Defence of Forum Shopping: A Realistic Look at Selecting a Venue. - Nebraska Law Review. 1999/78. Issue 1, p. 79; Busch, M. L. Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade. - International Organization. 2007/61, p. 736; Sykes, A. O. Transnational Forum Shopping as a Trade and Investment Issue. - Journal of Legal Studies. 2008/37. No. 2, p. 339; Whytock, C. A. The Evolving Forum Shopping System. - Cornell Law Review. 2011/96. Issue 3, p. 485.

⁴¹² Pauwelyn, J., Salles, L. E. Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions. - Cornell International Law Journal. 2009/42. Issue 1, p. 79.

⁴¹³ *Ibid*, p. 83.

⁴¹⁴ Delimatsis, p. 10.

⁴¹⁵ Orellana, M. The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea. - American Society of International Law Insights. 2001/6. Issue 1. 2001. Available at: <https://www.asil.org/insights/volume/6/issue/1/eu-and-chile-suspend-swordfish-case-proceedings-wto-and-international> (15.04.2017); Summary of the dispute: Chile - Measures affecting the Transit and Importing of Swordfish. The Website of the WTO. Last updated 2010. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm (15.04.2017).

⁴¹⁶ Orellana.

settlement under the UNCLOS.⁴¹⁷ The EU agreed and in May 2000, the EU and Chile informed the WTO Dispute Settlement Body that, pursuant to Article 3.6 of the DSU, they intend to notify to the WTO Dispute Settlement Body any mutually agreed solution to the matters raised under the consultation and dispute settlement provisions of the covered agreements once any such mutually agreed solution has been ratified in accordance with their respective domestic law requirements.⁴¹⁸ In November 2000, the parties agreed ad-referendum to the establishment of a special five-judge Chamber of the ITLOS and the agreement was ratified in December 2000.⁴¹⁹

In conclusion, the *Chile - Swordfish* case is an example of a complicated situation where possibly forum shopping could exist, but in this case the parties have peacefully agreed in which tribunal to solve the dispute.

It has been argued that the international trade law system triggers very strongly forum shopping between the dispute settlements conducted by the WTO and NAFTA.⁴²⁰ M. L. Busch brings out five reasons for that. Firstly, it is the way how the WTO itself addresses the problem.⁴²¹ On the one hand, the WTO claims to have compulsory jurisdiction over those disputes that arise among its members.⁴²² On the other hand, the WTO approves preferential trade agreements under Article XXIV of the GATT, taking into account that many have dispute settlement mechanisms of their own, thus inviting forum shopping.⁴²³ Secondly, there are clearly differences in law across the WTO and NAFTA.⁴²⁴ Thirdly, there is little variation in the timeliness of proceedings.⁴²⁵ Fourthly, the NAFTA never permitted defendants to block panel reports, a feature that compared favourably to GATT, but has been woven into the WTO.⁴²⁶ Fifthly, the availability of remedies at the end of a dispute might be also one factor for forum shopping.⁴²⁷ The WTO and NAFTA outline similar procedures whereby a wronged complainant might seek redress, though NAFTA provisions, on occasion, allow for more direct compensation.⁴²⁸

⁴¹⁷ Orellana.

⁴¹⁸ Summary of the dispute: *Chile - Measures affecting the Transit and Importing of Swordfish*.

⁴¹⁹ Orellana.

⁴²⁰ See the full article: Busch, M. L. *Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade*. - International Organization. 2007/61.

⁴²¹ Busch, p. 738.

⁴²² *Ibid.*

⁴²³ *Ibid.*

⁴²⁴ Busch, p. 739.

⁴²⁵ *Ibid.*

⁴²⁶ *Ibid.*

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.*

Even though these arguments might be true and there might be some possibility to forum shopping between the WTO and the NAFTA dispute settlement, none of the previous five factors makes different the way how treaty is being interpreted in the WTO and the NAFTA. For instance, it has been claimed that related to the *Mexico - Soft Drinks* case there existed some forum shopping between the WTO and the NAFTA, but it was not related to the treaty interpretation.⁴²⁹ Furthermore, NAFTA is a regional agreement which is agreed only between the USA, Mexico and Canada.⁴³⁰ Thus, these previously presented concerns are relevant only in disputes where these certain states are involved.

Moreover, in some cases it might be even hard to predict which is the outcome from the WTO dispute settlement, because of two reasons. Firstly, the WTO Appellate Body and the panels tend to have also controversial practice relating to treaty interpretation and, thus, the legal subject can never be sure which interpretation approach would be chosen during settling the specific dispute. Secondly, even if the legal subject would know which treaty interpretation method would be used, it is still hard to tell what is the exact outcome of the interpretation, as it is a very complicated process. Thus, if the subject cannot predict the outcome, how can he choose the most advantageous venue for solving the dispute?

The same applies to the problem that non-WTO rules tend to be irrelevant in the WTO dispute settlement. It may be argued that it triggers forum shopping, because it is more clever to file an action to the tribunal or court which would recognize also other treaties and would not follow the approach taken by the WTO. However, as the case law by the WTO is also itself fragmented - there are cases where rules of other regimes of international law are taken into account and cases where these rules play no role - it is again hard to predict the outcome of a dispute.

In conclusion, the fear of forum shopping might be a realistic problem in some rare cases. Nevertheless, in questions related to treaty interpretation it seems rather a hypothetical or theoretical problem and it has not really existed in practice. Thus, it is hard to argue that the fragmented practice of treaty interpretation of the WTO dispute settlement is somehow affecting or even triggering forum shopping.

⁴²⁹ See for example: Pauwelyn and Salles, pp 77-78.

⁴³⁰ Alexander, D. C. The North American Free Trade Agreement: An Overview. - Berkley Journal of International Law. 1993/11. Issue 1, p. 48; Fergusson, I. F., Villarreal, M. A. The North American Free Trade Agreement (NAFTA). 2015. Available at: <https://fas.org/sgp/crs/row/R42965.pdf> (15.04.2017).

3.4. Strengthening international law

One of the possible outcomes of fragmentation of international law is the strengthening of international law in general, because it is a normal development of a globalised world. Development of international law can be seen as a common-law-like process involving the accretion of judicial decisions.⁴³¹

The phenomenon of the diversification of the specialized substantive fields of law is not only relevant to international law, but also to domestic systems of law.⁴³² Even though in domestic law fragmentation is frequently perceived as pathologic because of difficulties to identify among a plethora of rules, the proper applicable rule, in particular by their addressees.⁴³³ However, it can be argued that the fragmentation of international law is also not a pathology, but a result of a normal development of international law.⁴³⁴ In the section 1.1.2. the reasons and background of the fragmentation were discussed and each of the reasons were also natural developments of the society.

The development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction.⁴³⁵ Treaties concluded in the last decades have consolidated and expanded diverse fields including the law of the sea, international trade law, human rights, environmental law and international criminal law.⁴³⁶ Most of these areas of international law are served by their own special monitoring bodies or tribunals.⁴³⁷ Each time a new international tribunal is proposed under any new regime, the need for its establishment is carefully considered.⁴³⁸ The creation of a tribunal is often justified by the special futures of the regime it is meant to serve by way of implementation and development.⁴³⁹ Judge R. Higgins of the ICJ has found new tribunals important because of certain decentralisation of some of the topics with which the ICJ can in principle deal to new, highly specialised bodies, whose members are experts in a subject

⁴³¹ McRae 2006, p. 362.

⁴³² Lattanzi, F. Introduction. - van den Herik, L., Stahl, C. (eds). *The Diversification and Fragmentation of International Criminal Law*. Leiden: Martinus Nijhoff Publishers 2012, p. 2.

⁴³³ *Ibid.*

⁴³⁴ *Ibid.*

⁴³⁵ Sir Lauterpacht, H. *The Development of International Law by the International Court*. London: Stevens & Sons 1958, pp 6-7.

⁴³⁶ Rao, p. 945.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

matter which becomes ever more complex, which are more open to non-state actors and which can respond rapidly.⁴⁴⁰

The fragmentation of international law is, thus, rather a sign of the vitality of international law, because the proliferation of rules, regimes and institutions also strengthens international law.⁴⁴¹ The emergence of new regimes of international law, novel types of treaties or clusters of treaties is a feature of the social complexity of a globalising world.⁴⁴² These deviations do not emerge as legal or technical mistakes, but rather they reflect the differing pursuits and preferences of actors in a pluralistic global society.⁴⁴³ The fragmentation of international law very often reflects the diversity of values and alternatives within different circumstances.⁴⁴⁴

International law may be a unified system at some level (in the sense, for example, that all of its rules and specific regimes interact and are governed by certain general rules), but it is also a universe of different systems, sub-systems or regimes at another level.⁴⁴⁵ As it was explained also in the section 1.1.2., the reason for this is mostly the fact that there is no centralised authority and no judicial power in international law.⁴⁴⁶ In international law every judicial organ has its own separate source of legitimisation, or legal empowerment, which invests it with judicial power (whether it be the consent of the parties or, in exceptional circumstances, the decision of a constitutionally authorised organ), rather than deriving it from a common, centralised pool that infuses all courts with judicial power and by the same token related them to each other.⁴⁴⁷

⁴⁴⁰ Higgins, R. Respecting Sovereign States and Running a Tight Courtroom. - The International and Comparative Law Quarterly. 2001/50. No. 1, pp 121-122.

⁴⁴¹ Deplano, R. Fragmentation and Constitutionalisation of International Law: A Teleological Inquiry. Doctoral thesis. Brunel: Brunel University 2012. Available at: <http://bura.brunel.ac.uk/bitstream/2438/6976/1/FulltextThesis.pdf> (15.04.2017), p. 47; Fauchald, O. K., Nollkaemper, A. Conclusions. - Fauchald, O. K., Nollkaemper, A. (eds). The Practice of International and National Courts and the (De-)Fragmentation of International Law. Portland: Hart Publishing 2014, p. 343; Pauwelyn 2006, para. 17; Pulkowski, D. Narratives of Fragmentation: International Law between Unity and Multiplicity. 2006. Available at: http://www.esil-sedi.eu/sites/default/files/Pulkowski_0.PDF (15.04.2017), p. 1; Rao, p. 959.

⁴⁴² Report of the Study Group of the International Law Commission, para. 222; Sacerdoti 2008, p. 606.

⁴⁴³ Report of the Study Group of the International Law Commission, para. 11.

⁴⁴⁴ Follesdal, A. Fragmentation in International Human Rights Law - Beyond conflict of International Courts in a State of Nature: Foreword. - Ajevski, M. (editor). Fragmentation in International Human Rights Law: Beyond Conflict of Laws. London: Routledge 2015, p. 2.

⁴⁴⁵ Michaels and Pauwelyn, p. 375.

⁴⁴⁶ Abi-Saab 2006, p. 926.

⁴⁴⁷ *Ibid.*

The fragmentation of international law may even sabotage the evolution of a more democratic and egalitarian international regulatory system.⁴⁴⁸ One of the positive effects of fragmentation of international law is the increase in generation of more detailed and specific laws, because the fragmentation of international law also reflects a growing specialization of international regulations and regimes.⁴⁴⁹ Specialization accommodates various needs and concerns of the parties engaged in international adjudication.⁴⁵⁰

One strength of the multiplicity of international tribunals is also that it permits a degree of experimentation and exploration, which can lead to improvements of international law.⁴⁵¹ The lack of strictly hierarchical system provides international tribunals with the opportunity to contribute collectively ideas that might be incorporated into general international law.⁴⁵² It also facilitates the evaluation of those ideas by the international community as a whole.⁴⁵³ Ultimately, one would expect that the best ideas will be adopted widely, contributing to the body of international law.⁴⁵⁴ An overly strict hierarchical structure for international decisions could place undesirable constraints on the development of general international law and specialized law for special areas.⁴⁵⁵

Fragmentation reflects the necessity of offering different institutions with different structures, which permits people to resort to the institutions that is the best fit for a given dispute.⁴⁵⁶ Special courts and their rules of procedure can better accommodate the special needs of certain situations.⁴⁵⁷ Such special regimes could be used to progressively develop international law and serve as a precedent for a global regime.⁴⁵⁸

It has been claimed that in most cases these specialised international courts and tribunals are quite conscious of the need to align their jurisprudence with the well-established norms of international law.⁴⁵⁹ For instance it has been found that the boom of investment arbitration contributes to the development of general international law by rendering decisions on

⁴⁴⁸ Fauchald and Nollkaemper. Introduction. 2014, p. 7.

⁴⁴⁹ Hafner, p. 859.

⁴⁵⁰ *Ibid.*

⁴⁵¹ Charney, J. I. The Impact on the International Legal System of the Growth of International Courts and Tribunals. - NYU Journal of International Law and Politics. 1999/31, p. 700.

⁴⁵² Charney, p. 700.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Hafner, p. 859.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Rao, p. 959.

questions such as attribution of conduct to states, preclusion of wrongfulness, treaty interpretation and others.⁴⁶⁰ That the increase of investment decisions also leads to a certain number of inconsistencies is probably normal in any developed legal system and, thus, the risk of fragmentation should not be exaggerated.⁴⁶¹

General principles of international law, particularly those pertaining to international treaty interpretation provide a necessary basis for the application and implementation in every specific regime.⁴⁶² If these rules are followed then it adds strength to the international legal system without affecting the unity and coherence of international law.⁴⁶³ The problem with the WTO dispute settlement is that they tend to implement the rules of treaty interpretation provided by the VCLT differently than the ICJ and other international courts and tribunals.

Nevertheless, the WTO and its dispute settlement is actually a very good example of a well working specialised system of international law. It has concluded a comprehensive legislation concerning trade law and the Appellate Body and the panels gather experts of trade law. In this sense the WTO has definitely contributed to the strengthening of international law. It is clear that the panels and the Appellate Body have also developed international trade law through the WTO's dispute settlement system.⁴⁶⁴ They have clarified the obligations of the members of the WTO.⁴⁶⁵ There are also many procedural developments that the Appellate Body has provided - burden of proof, judicial economy, completing the analysis, *stare decisis* and *amicus* briefs.⁴⁶⁶

In the view of the current thesis it is more important to analyse how the panels and the Appellate Body have contributed to the strengthening of international law through their way of interpreting treaties. While interpreting a treaty, they have clarified the meaning of the treaty provisions.⁴⁶⁷ They have, thus, made a substantial contribution to the development of international trade law.⁴⁶⁸ But on this basis, any court that interprets a treaty and gives reasons

⁴⁶⁰ Reinisch, A. The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration. - Buffard, I. *et al.* (eds). International Law between Universalism and Fragmentation. Festschrift in Honour of Gerhard Hafner. Leiden: Martinus Nijhoff Publishers 2008, p. 125.

⁴⁶¹ Reinisch 2008, p. 125.

⁴⁶² Rao, p. 955.

⁴⁶³ *Ibid.*

⁴⁶⁴ McRae 2006, p. 360.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ McRae 2006, p. 361-362; Ehlermann, p. 605.

⁴⁶⁷ McRae 2006, p. 362.

⁴⁶⁸ *Ibid.*

is contributing to the development of international law.⁴⁶⁹ The real question is whether the panels and the Appellate Body have done a good job of interpreting and applying the law.⁴⁷⁰ As explained in the chapter 2, the panels and the Appellate Body have rather departed from the general rules of treaty interpretation laid down in the Art. 31 of the VCLT.

However, it has been explained earlier in the current chapter that the WTO is still working very effectively and is enjoying rather a good reputation. The WTO Appellate Body and panels are solving a huge amount of cases every year and the parties to the disputes tend to be rather satisfied with the outcome. Maybe the way how the WTO Appellate Body and panels interpret treaties should also be seen as a positive innovation. We can see this as a sign that we should not be too much stuck in the rules of the VCLT, which were laid down decades ago. Maybe it is time to let the international court system to develop naturally in a way where it can perform the most effectively and come up with the best solutions to the parties of the case, even if it is sometimes a little bit conflicting with the VCLT.

In conclusion, the fragmentation of international law can indeed strengthen international law. The proliferation of international courts and tribunals and the diversification of the specialized regimes of law is an essential feature of the social complexity of a globalising world. The WTO has definitely contributed to the strengthening of international law in this sense, as it has drawn up a specific system of international trade law. On the other hand, it is important that these specialised systems have to align their jurisprudence with the well-established norms of international law, for example with the rules of treaty interpretation provided by the VCLT. In this sense the WTO dispute settlement has not contributed to the strengthening of international law, because it has not successfully implemented the rules of interpretation of a treaty in its practice. Nevertheless, this could be seen also as a positive innovation, since we should let the international court system to develop naturally in a way where the parties to the dispute get the most satisfying outcome.

⁴⁶⁹ McRae 2006, p. 362.

⁴⁷⁰ *Ibid.*

Conclusion

The current master's thesis aimed, firstly, to find out whether the practice of treaty interpretation in the WTO dispute settlement is fragmented compared to the practice of general international law and other special regimes of international law. Secondly, the purpose of the current master's thesis was also to analyse the possible effect of the fragmented practice of treaty interpretation in the WTO dispute settlement to the international community and international law in general.

Regarding the first research question it can be concluded that the practice of treaty interpretation in the WTO dispute settlement is to a certain extent indeed fragmented. The current master's thesis analysed two main issues - the treaty interpretation methods in the practice of the WTO dispute settlement and the irrelevance of other rules of international law in the practice of the WTO dispute settlement.

Firstly, it was analysed whether the treaty interpretation methods used in the practice of the WTO dispute settlement are in accordance with the methods provided by the Art. 31(1) of the VCLT. Also, the practice regarding the Art. 31(1) of the VCLT of other international courts and tribunals was analysed. It can be concluded that the practice of the WTO dispute settlement is not unified. On the one hand, there are examples where the WTO Appellate Body and panels have explicitly followed the holistic approach while choosing the methods of interpretation. It means that the WTO Appellate Body and the panels have tried to reach the conclusion on the ordinary meaning of the term at issue only upon the examination of all the relevant elements, taken as a whole, rather than examining each element in turn until the meaning of the term at issue is revealed. On the other hand, sometimes the WTO Appellate Body and the panels of the WTO tend to promote the text of the treaty and have adopted rather a textual or hierarchical approach.

Even though the WTO Appellate Body and the panels have been criticised by many scholars, because of using textual or hierarchical approach, I do not agree with this opinion. There are many other international courts and tribunals who use textual method for interpreting treaties and this has also been accepted in legal literature. Thus, it is impossible to say that the WTO dispute settlement is causing the fragmentation of international law concerning the practice of the Art. 31(1) of the VCLT.

Secondly, it was discussed whether the rules of general international law and rules from other regimes of international law are considered relevant by the WTO Appellate Body and the panels in the WTO dispute settlement. The Art. 31(3)(c) of the VCLT requires that other relevant rules of international law applicable between the parties have to be taken into account while interpreting a treaty.

The practice of the WTO dispute settlement is again not unified. On the one hand, there are examples where the WTO Appellate Body and panels have acted in accordance with the Art. 31(3)(c) of the VCLT. Furthermore, the WTO Appellate Body stated even in its very first case that the WTO law “should not be read in clinical isolation from public international law”. This approach is actually in accordance with the requirements of the VCLT.

On the other hand, there are cases where the WTO Appellate Body and the panels have refused to accept rules that derive from other regimes of international law. In this sense the practice of the WTO dispute settlement is fragmented compared to other international courts and tribunals. However, there are scholars who support the view that the WTO is a self-contained regime and, thus, it can be justified that the other rules of international law are sometimes irrelevant in the adjudication in the WTO dispute settlement. This view is not supported by the current master’s thesis.

Nevertheless, even if the WTO system is not seen as a self-contained regime, there can still be found reasonable explanations why the reports by the panels and the WTO Appellate Body are sometimes conflicting with the Art. 31(3)(c) of the VCLT. In this sense I agree with A. Lang who argues that the reason for that is rather that the WTO Appellate Body and panels have adopted a self-consciously cautious and non-confrontational style of decision-making. The Appellate Body and the panels are very often seeking to avoid addressing the problem of normative conflicts, refusing to hierarchise different regimes of international law, rejecting anything which looks like an attempt to systematise or constitutionalise international law, and leaving controversial questions as open as possible, for as long as reasonable.

It is especially understandable, because the members of the WTO Appellate Body and panels are, above all, trade experts. Thus, it might be too much to expect from them an extensive knowledge of all specific regimes of international law, like environmental law, human rights law, international criminal law etc. Also, they are not paying so much attention on legal

theory, but more on the practical solution, questioning which solution is better for the parties to the dispute.

In conclusion, the first hypothesis is correct. The practice of treaty interpretation in the WTO dispute settlement is fragmented, at least to a certain extent. Even though there are some examples where the WTO Appellate Body and the panels have acted in accordance with the VCLT, there are also too many examples of conflicting practice. However, as there are other international courts and tribunals whose practice is not in accordance with the holistic approach initially required by the Art. 31(1) of the VCLT, it cannot be argued that the WTO dispute settlement is causing this fragmentation.

Regarding the second research question it can be concluded that the fragmented practice of treaty interpretation affects the international law and community, but these effects are not fundamental. Four possible effects of the fragmented practice of treaty interpretation in the WTO dispute settlement are being analysed: the decrease of the credibility and reliability of the WTO, the decrease of the authority of the WTO, forum shopping and strengthening of international law.

Firstly, it is not very likely that the fragmented practice of treaty interpretation decreases the credibility and reliability of the WTO. It is likely to some extent, since the WTO Appellate Body and panels have gone into conflict with general international law and other regimes of international law. On the other hand, it does not seem to be a problem in reality. The risk of conflicting judgments regarding international trade law is still a theoretical problem, because so far there are no trade law cases which have been solved in a contrary fashion by different international courts or tribunals.

Moreover, it can be argued that if the WTO Appellate Body and panels would start applying all kinds of international treaties, probably the outcome of the dispute would get even more unclear. The WTO Appellate Body and panels are used to applying the WTO law and solving the issues related to international trade. They are not familiar with applying, for example, environmental law, human rights law or international criminal law. If they would start applying the laws of all specific regimes of international law, the parties would have even less idea of the result of the dispute. Thus, this would really decrease the credibility and reliability of the WTO.

Secondly, the fragmentation might also theoretically decrease the authority of the WTO, but in practice it does not seem to be a big problem. It's rather the other way around - the WTO dispute settlement is very successfully solving trade disputes. It is claimed to be well-established and fast. Furthermore, it covers almost all of the trade taking place in the world. This is also a reason why the WTO dispute settlement system is often called the "World Trade Court".

Thirdly, conflicting judgments from different international tribunals and courts can also trigger forum shopping. There are scholars who argue that there might be some forum shopping between the NAFTA and the WTO adjudications, but more precise analysis shows that it is not caused by the fragmentation of treaty interpretation. Moreover, as the WTO Appellate Body and panels are also not following their own practice, it is also hard to predict the exact outcome of the disputes in the WTO dispute settlement. Thus, it is hard to argue that the fragmented practice of treaty interpretation of the WTO dispute settlement is in reality triggering forum shopping.

Fourthly, it is possible to argue that the fragmentation strengthens international law in general. The proliferation of international courts and tribunals and the diversification of the specialized regimes of law is an essential feature of the social complexity of a globalising world. The WTO has definitely contributed to the strengthening of international law in this sense, as it has drawn up a specific system of international trade law.

However, it is important that specialised tribunals and courts have to follow the well-established norms of international law, for example the rules of treaty interpretation. In this sense it is questionable whether the WTO dispute settlement has contributed to the strengthening of international law, because it has not successfully implemented the rules of interpretation of a treaty in its practice. Nevertheless, why not to see this as a contribution to the strengthening of international law? The WTO Appellate Body and the panels are solving a lot of cases every year and the parties to the disputes are rather satisfied with the outcome. Thus, maybe the way how the treaties are being interpreted in the WTO dispute settlement should be seen as a positive innovation.

In conclusion, also the second hypothesis is correct. Even though the treaty interpretation practice in the WTO dispute settlement is fragmented, it does not seem to bring extremely tragic or irrevocable effects to international law and to international community in general.

Thus, we should try to find explanations for this and try to understand why the WTO Appellate Body and panels have chosen to interpret treaties this way. Maybe we should consider more important the final outcome of the dispute and should not criticise so strictly the way how this solution is reached?

As the fragmentation of international law is an extensive and problematic issue, there are a lot more ways how to address the problem and, also, how to continue researching it. It seems to me that too little attention has been given to the reasons of the WTO Appellate Body and panels for making the decisions addressed in the current master's thesis. Is it just the lack of knowledge or are there practical reasons for that? In general, the powers and practices of international courts and tribunals to counteract the fragmentation of international law could be analysed in the future.

Rahvusvaheliste lepingute tõlgendamine vaidluste lahendamisel Maailma Kaubandusorganisatsioonis: killustatuse probleem

Resümee

Rahvusvahelise õiguse killustatusest on räägitud juba aastakümneid. Vaieldud on, kas ja mil määral on rahvusvaheline õigus killustunud ning kas tegemist on pigem positiivse või negatiivse nähtusega. On mitmeid küsimusi, mille puhul õigusteadlaste arvamused mitte ainult ei ühti, vaid on täiesti vastandlikud. Üks sellistest on Maailma Kaubandusorganisatsiooni positsioon rahvusvahelise õiguse killustatuses. Kuigi Maailma Kaubandusorganisatsiooni apellatsioonikogu rõhutas juba oma kõige esimeses, 1996. aastal koostatud raportis, et Maailma Kaubandusorganisatsiooni õigust ei tohiks lugeda isoleeritult rahvusvahelisest õigusest, siis endiselt on õhus küsimus, kas seda ka reaalselt vaidluste lahendamisel järgitakse. Käesolev magistritöö keskendubki Maailma Kaubandusorganisatsiooni positsioonile rahvusvahelise õiguse killustatuse probleemis.

Kuna rahvusvahelise õiguse killustatus on küllaltki lai teema, siis konkreetsemalt käsitletakse rahvusvaheliste lepingute tõlgendamist. Lepingute tõlgendamine on vaieldamatult kõigi rahvusvaheliste kohtute ja tribunalide üks keskseid ülesandeid. Täpsemalt käsitletakse kahte Rahvusvaheliste lepingute õiguse Viini konventsiooni sätet, mis keskenduvad rahvusvaheliste lepingute tõlgendamisele. Esiteks käsitletakse artikli 31 lõiget 1, mis sätestab: “Lepingut tõlgendatakse heas usus, andes lepingus kasutatud mõistetele konteksti arvestades tavatähenduse ning lähtudes lepingu mõttest ja eesmärgist.” Teiseks analüüsitakse Maailma Kaubandusorganisatsiooni vaidluste lahendamise organite praktikat seoses artikli 31 lõike 3 punkti c-ga, mis sätestab: “Rööbiti kontekstiga võetakse arvesse: /.../ rahvusvahelise õiguse asjaomaseid norme, mida kohaldatakse osalisriikide suhtes.”

Rahvusvaheliste lepingute tõlgendamine on rahvusvahelise õiguse killustatuse tähenduses väga oluline teema, kuna lepingute tõlgendamine saab olla n-ö diplomaatiaks, millega välditakse normatiivsete vastuolude esilekerkimist. Rahvusvaheliste lepingute tõlgendamisel selgitatakse välja sätete täpne tähendus ning kui kõik rahvusvahelised kohtud ja tribunalid kasutavad lepingute tõlgendamisel samu meetodeid, siis on võimalik hoida ära rahvusvahelise õiguse killustatust. Juhul kui erinevad rahvusvahelised kohtud ja tribunalid tõlgendavad samu reegleid erinevalt, lähtudes seejuures oma valdkonna spetsiifilistest eesmärkidest, väärtustest ja kogukonna huvidest, siis see hoopis soodustab rahvusvahelise õiguse killustatust.

Isegi kui Maailma Kaubandusorganisatsiooni vaidluste lahendamise praktika soodustab rahvusvahelise õiguse killustatust, siis ei ole selge, mis on killustatuse reaalne mõju rahvusvahelisele kogukonnale ja rahvusvahelisele õigusele tervikuna. On mitmeid õigusteadlaseid, näiteks J. Pauwelyn, D. McRae, L. Gruszczynski ja F. Ortino, kes on oma teostes kritiseerinud Maailma Kaubandusorganisatsiooni ning leidnud, et vaekogude ja apellatsioonikogu raportid on vastuolus Rahvusvaheliste lepingute õiguse Viini konventsiooniga. Samas väga tihti keskenduvad need artiklid ainult konkreetsete raportite kritiseerimisele. Ridade vahelt võib lugeda negatiivset hinnangut, kuid nende raportite mõju rahvusvahelisele õigusele ja kogukonnale üldiselt analüüsitud ei ole. Seetõttu keskendub käesolev magistritöö ka küsimusele, milline on lepingute tõlgendamise killustatuse mõju rahvusvahelisele kogukonnale ja rahvusvahelisele õigusele tervikuna. Kas ka tegelikkuses esineb probleem või on pigem tegemist probleemiga, mis on esindatud vaid akadeemilises kirjanduses?

Kokkuvõttes on käesoleval magistritööl kaks peamist uurimisküsimust. Esiteks, kas lepingute tõlgendamise praktika on Maailma Kaubandusorganisatsiooni vaidluste lahendamise organites killustatud? Teiseks, kui eelmine küsimus on vastatud jaatavalt, milline on lepingute tõlgendamise praktika killustatuse mõju rahvusvahelisele kogukonnale ja rahvusvahelisele õigusele tervikuna? Vastavalt neile uurimisküsimustele on püstitatud ka kaks hüpoteesi. Esiteks, lepingute tõlgendamise praktika on Maailma Kaubandusorganisatsioonis vaidluste lahendamisel killustatud. Teiseks, lepingute tõlgendamise praktika killustatus mõjutab rahvusvahelist kogukonda ja rahvusvahelist õigust tervikuna, aga see mõju ei ole fundamentaalne.

Magistritöö kirjutamisel on kasutatud mitmeid erinevaid uurimismeetodeid, et jõuda rahuldavate ja adekvaatsete tulemusteni. Enamasti on kasutatud analüütilist ja süstemaatilist meetodit. Uurimisküsimustele on lähenetud süstemaatiliselt: esmalt uuritakse, kas rahvusvaheliste lepingute tõlgendamisel Maailma Kaubandusorganisatsiooni vaidluste lahendamise organites esineb killustatus, ning alles seejärel, kui esimene küsimus on vastatud jaatavalt, selgitatakse välja, millised on killustatuse tagajärjed. Magistritöös on toodud näiteid kaasustest, milles Maailma Kaubandusorganisatsiooni vaekogud või apellatsioonikogu tõlgendavad rahvusvahelisi lepinguid. Neid on analüüsitud ning võrreldud nii teiste Maailma Kaubandusorganisatsiooni vaekogud ja apellatsioonikogu raportitega kui ka teiste rahvusvaheliste kohtute ja tribunalide lahenditega. Seega on magistritöö kirjutamisel kasutatud ka võrdlevat meetodit. Lisaks on analüütilist ja võrdlevat meetodit kasutatud

selleks, et analüüsida võimalikke killustatuse tagajärgi. Seejuures võrreldakse erinevate õigusteadlaste arvamusi.

Parimate lahenduste leidmiseks on kasutatud mitmeid erinevaid allikaid. Suureks abiks olid teaduslikud artiklid, uurimistööd ja raamatud erinevatelt õigusteadlastelt. Näiteks on töös kajastatud M. Koskenniemi, J. Pauwelyni ja D. McRae ideid, kuna nad on tihti käsitlenud rahvusvahelise õiguse, s.h rahvusvahelise kaubandusõiguse killustatuse probleemi. Keskne õigusakt magistritöös on Rahvusvaheliste lepingute õiguse Viini konventsioon, kuid viidatud on ka muudele lepingutele, näiteks Üldisele tolli- ja kaubanduskokkuleppele ja Põhja-Ameerika vabakaubanduse lepingule. Suure tähtsusega on ka Maailma Kaubandusorganisatsiooni vaidluste lahendamise organite praktika. Magistritöös on analüüsitud ainult neid kaasuseid, mis on seotud rahvusvaheliste lepingute tõlgendamisega. Läbi on töötatud kogu relevantne praktika alates Maailma Kaubandusorganisatsiooni asutamisest 1995. aastal. Kuna magistritöö maht on piiratud, siis on valitud, milliseid kaasuseid magistritöös pikemalt analüüsida. Peamiselt on keskendutud kaasustele, mida on ka mitmed õigusteadlased oma töödes kas kritiseerinud või kiitnud, kuna see annab võimaluse mitmekülgsemaks analüüsiks.

Teemast selgema ülevaate saamiseks on käesolev magistritöö jagatud kolmeks peatükiks. Esimene peatükk selgitab teema laiemat tausta. Ühest küljest annab see ülevaate rahvusvahelise õiguse killustatusest üldiselt - selle tähendusest, alaliikidest ning põhjustest. Lisaks näidatakse ära see suund, mida antud magistritöös analüüsitakse - magistritöö keskendub praktika killustatusele, kuid mitte rahvusvaheliste lepingute killustatusele. Teisest küljest käsitletakse esimeses peatükis ka rahvusvahelise kaubandusõiguse olemust ning Maailma Kaubandusorganisatsiooni positsiooni selles. See peatükk tervikuna loob vajaliku aluspinna selleks, et konkreetse teemaga tegeleda. Näiteks selleks, et uurida, kas Maailma Kaubandusorganisatsiooni vaidluste lahendamisel kohaldatakse Rahvusvaheliste lepingute õiguse Viini konventsiooni korrektelt, on vaja ära näidata, kuidas suhestub rahvusvaheline kaubandusõigus üldise rahvusvahelise õigusega. Lisaks on oluline mõista Maailma Kaubandusorganisatsiooni vaidluste lahendamise süsteemi, kuna teises peatükis keskendutakse oluliselt Maailma Kaubandusorganisatsiooni apellatsioonikogu ja vaekogude raportitele.

Teine peatükk tegeleb otseselt esimese uurimisküsimusega - kas lepingute tõlgendamise praktika Rahvusvahelise Kaubandusorganisatsiooni vaidluste lahendamise organites on

killustatud. Esiteks analüüsitakse Rahvusvahelise Kaubandusorganisatsiooni vaekogude ja apellatsioonikogu praktikat seoses Rahvusvaheliste lepingute õiguse konventsiooni artikli 31 lõikega 1. Seejuures jõutakse järeldusele, et osa raportites on kasutatud holistlikku meetodit ning osa raportites on keskendutud lepingute tõlgendamisel eelkõige tekstil. Viimati nimetatud lähenemist on kritiseerinud mitmed erinevad õigusteadlased, kuid käesolevas magistritöös selle vaatega ei nõustuta. Sellise kriitika eelduseks on, et kõik teised rahvusvahelise kohtud ja tribunalid tõlgendavad rahvusvahelisi lepinguid kasutades holistilist meetodit. Reaalsuses see aga nii ei ole ning ka õiguskirjanduses on aktsepteeritud, et tekst on esmane ja kõige olulisem element rahvusvaheliste lepingute tõlgendamisel.

Teiseks käsitletakse Rahvusvahelise Kaubandusorganisatsiooni vaekogude ja apellatsioonikogu praktikat seoses Rahvusvaheliste lepingute õiguse Viini konventsiooni artikli 31 lõike 3 punktiga c. Seejuures analüüsitakse, kas vaidlusta lahendamisel Maailma Kaubandusorganisatsioonis võetakse lepingute tõlgendamisel arvesse ka üldise rahvusvahelise õiguse ning teiste rahvusvahelise õiguse valdkondade reegleid või lähtutakse ainult rahvusvahelisest kaubandusõigusest. Ka selles osas on Rahvusvahelise Kaubandusorganisatsiooni apellatsioonikogu ja vaekogud teinud erinevasisulisi lahendeid - on nii selliseid raporteid, kus kohaldatakse reegleid teistest rahvusvahelise õiguse valdkondadest, kui ka selliseid, kus on jäädud ainult rahvusvahelise kaubandusõiguse kohaldamise juurde. Kuigi see, et lepingute tõlgendamisel kohaldatakse ainult rahvusvahelist kaubandusõigust, ei ole kooskõlas Rahvusvaheliste lepingute õiguse Viini konventsiooniga, on see siiski arusaadav. Nimelt on Rahvusvahelise Kaubandusorganisatsiooni apellatsioonikogu ja vaekogude liikmed kaubanduseksperdid ning oleks liiast oodata neilt spetsiifilisi teadmisi kõikvõimalikest rahvusvahelise õiguse valdkondadest.

Seega võib teise peatüki kokkuvõtteks öelda, et esimene hüpotees leidis kinnitust. Maailma Kaubandusorganisatsiooni lepingute tõlgendamise praktika on killustunud seoses Rahvusvaheliste lepingute õiguse Viini konventsiooni artikli 31 lõike 3 punktiga c. Kuigi ka Rahvusvaheliste lepingute õiguse Viini konventsiooni artikli 31 lõike 1 praktika ei ole ühtlane, siis ei ole õige öelda, et sellist ebaühtlust põhjustaks Maailma Kaubandusorganisatsioon. Nimelt ka teised rahvusvahelised kohtud ja tribunalid kohaldavad vastavat sätet erinevalt.

Kolmas peatükk keskendub põhiliselt teisele uurimisküsimusele ning seega analüüsib, millist mõju omab lepingute tõlgendamise praktika killustatus rahvusvahelisele kogukonnale ja

rahvusvahelise õigusele tervikuna. Selles tuuakse välja erinevate õigusteadlaste ideed ning lisatud on ka autori oma vaateid. Selle peatüki eesmärk ei ole öelda lõplikult, kas selline lepingute tõlgendamise praktika killustatus on positiivne või negatiivne nähtus, vaid pigem käsitletakse selle erinevaid tahkusi. Lisaks analüüsitakse võimalike tagajärgede reaalsuses esinemist - kas tegemist on pigem fiktsiooni või reaalsete mõjudega?

Esiteks analüüsitakse, kas lepingute tõlgendamise praktika killustatus toob kaasa Maailma Kaubandusorganisatsiooni usaldusväarsuse vähenemise. Võib-olla mõningal määral on selline tagajärg põhjendatud, kuna Maailma Kaubandusorganisatsiooni apellatsioonikogu ja vaekogude raportid on tihti vastuolus Rahvusvaheliste lepingute õiguse Viini konventsiooniga ning ka teiste rahvusvahelise õiguse valdkondadega. Samas tegelikkuses ei paista see väga suur probleem olevat. Reaalsuses on vastandlike lahendite risk äärmiselt väike, kuna seni ei ole rahvusvahelised kohtud rahvusvahelises kaubandusõiguses vastandlikke lahendeid teinud. Tegemist on seega pigem teoreetilise probleemiga.

Lisaks on võimalik, et kui Maailma Kaubandusorganisatsiooni apellatsioonikogu ja vaekogud hakkaks kohaldama kõikvõimalikke relevantseid rahvusvahelise õiguse lepinguid, siis vaidluse lõplikku lahendit oleks veel keerulisem ette aimata. Maailma Kaubandusorganisatsioon on siiski spetsialiseerunud kaubandusvaidluste lahendamisele ning kaubandusõiguse kohaldamisele. Apellatsioonikogu ja vaekogud ei pruugi olla kursis näiteks rahvusvahelise keskkonnaõiguse, inimõiguste või rahvusvahelise kriminaalõiguse reeglitega. Kui nad hakkaksid kohaldama selliste spetsiifiliste valdkondade lepinguid, siis ilmselt oleks vaidluse osapooltel veel vähem aimu, milline on vaidluse lõplik lahendus. Kokkuvõttes võiks hoopis see vähendada Maailma Kaubandusorganisatsiooni apellatsioonikogu ja vaekogude usaldusväarsust.

Teiseks kaalutakse kuivõrd kahjustab rahvusvaheliste lepingute tõlgendamise killustatus Maailma Kaubandusorganisatsiooni mainet. Ka seejuures on pigem tegemist teoreetilise järeldusega, mida praktikas ei esine. Pigem on olukord vastupidi - Maailma Kaubandusorganisatsiooni vaidluste lahendamise süsteem lahendab kaubandusvaidluseid väga efektiivselt ja kiiresti. Peaaegu kõik maailma riigid kuuluvad Maailma Kaubandusorganisatsiooni ja seega katab Maailma Kaubandusorganisatsioon peaaegu kogu maailmas toimuvat kaubandust. See on ka põhjus, miks Maailma Kaubandusorganisatsiooni vaidluste lahendamise süsteemi kutsutakse tihti Maailma Kaubanduskohtuks.

Kolmandaks on argumenteeritud, et rahvusvahelise õiguse killustatus võib viia olukorrani, kus vaidluse osapooled hakkavad valima omale meelepärasest kohut, kuhu konkreetse vaidlusega pöörduda. Õiguskirjanduses on kajastatud mitmeid argumente, miks reaalsuses esineb mingil määral selline kohtualluvuse valimine Maailma Kaubandusorganisatsiooni ja Põhja-Ameerika vabakaubanduse lepingu vaidluste lahendamise süsteemi vahel. Samas ei ole see mitte kuidagi seotud rahvusvaheliste lepingute tõlgendamise küsimustega. Lisaks kuna Maailma Kaubandusorganisatsiooni apellatsioonikogu ja vaekogud ei järgi alati ka enda varasemat praktikat, siis on keeruline ennustada nende võimalikku otsust mingi konkreetse vaidluse puhul. Seega ei ole olukord, kus osapooled valivad omale meelepärasest kohtualluvust, antud magistratöö tähenduses asjakohane probleem.

Neljandaks on võimalik, et rahvusvahelise õiguse killustatus hoopis panustab rahvusvahelise õiguse arengusse. Spetsiifiliste valdkondade tekkimine ning neile vastavate kohtute asutamine on normaalne osa globaliseerumisest. Maailma Kaubandusorganisatsioon on panustanud rahvusvahelise õiguse arengusse, kuna ta on loonud efektiivselt töötava rahvusvahelise kaubandusõiguse süsteemi. Samas on oluline, et ka sellised spetsiifilised rahvusvahelise õiguse kohtud järgiksid oma menetluses ja lahendites üldise rahvusvahelise õiguse reegleid, näiteks rahvusvaheliste lepingute tõlgendamise reegleid. Kuna Rahvusvahelise Kaubandusõiguse apellatsioonikogu ja vaekogud seda alati ei tee, siis on küsitav, kui palju Maailma Kaubandusõiguses selles osas ikkagi rahvusvahelise õiguse arengusse panustab.

Samas teisest küljest saab lepingute tõlgendamist Maailma Kaubandusorganisatsioonis siiski näha kui viisi, kuidas panustada rahvusvahelise õiguse arengusse. Nimelt Rahvusvaheline Kaubandusorganisatsioon lahendab igal aastal väga suurel hulgal kaubandusvaidlusi ning vaidluste osapooled on pigem rahul vaidluste lahenditega. Seega võib-olla on see hoopis märk, et me ei peaks nii rangelt analüüsima, kas Maailma Kaubandusorganisatsiooni praktika ikka järgib kõiki reegleid, mis on juba aastakümneid tagasi Rahvusvaheliste lepingute õiguse Viini Konventsiooni kirja pandud. Ehk oleks parem näha seda võimaliku uuendusena, mille on Maailma Kaubandusorganisatsioon rahvusvahelisse õigusesse toonud?

Kokkuvõttes võib öelda, et rahvusvaheliste lepingute tõlgendamise praktika killustatus ei too rahvusvahelisele õigusele ja kogukonnale kaasa põhimõttelisi või pöördumatuid probleeme ning seega on ka teine hüpotees leidnud kinnitust. Pigem võiks otsida põhjendusi, miks on Maailma Kaubandusorganisatsioon otsustanud probleemidele selliselt läheneda. Võib-olla on õigustehnilistest vigadest olulisem see, milline on vaidluste lahendite reaalne mõju

osapooltele ning milline on nende rahulolu Maailma Kaubandusorganisatsiooni vaidluste lahendamise süsteemiga.

Getter Paberits, 28.04.2017

/allkirjastatud digitaalselt/

List of abbreviations

ACtHPR	African Court on Human and People's Rights
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BITs	Bilateral Investment Treaties
CJEU	Court of Justice of the European Union
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FAO	Food and Agriculture Organization
GATS	General Agreement on Trade Services
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organisation
ITLOS	International Tribunal for the Law of the Sea
ITO	International Trade Organisation
IMF	International Monetary Fund
ITLOS	International Tribunal for The Law of the Sea
ITU	International Telecommunications Union
NAFTA	North American Free Trade Agreement
OSPAR Convention	Convention for the Protection of the Marine Environment of the North-East Atlantic
SPS Agreement	Agreement on Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights

UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
VCLT	Vienna Convention on the Law of Treaties
WFP	World Food Programme
WHO	World Health Organisation
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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